TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 250.

THE TIOGA RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE BLOSSBURG AND CORNING RAILROAD COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

FILED NOVEMBER 11, 1872.

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INDEX.

	Original.	Print.
Declaration	3	1
Pleas	53	26
Amended plea and notice	55	27
Replications to pleas	57	28
Rejoinder to replication	60	30
Order of reference	61	30
Report of referee	67	31
Bill of exceptions	69	32
Judgment record in State court	213	122
Order denying motion to set aside the report of the referee, &c	292	160
Judgment	293	160
Writ of error	297	161
Citation	301	161
Bond on writ of error	303	162
Clerk's certificate	307	163

1 In the circuit court of the United States for the northern district of New York.

Pleas before the judges of the circuit court of the United States for the northern district of New York, at the village of Canandaigua, in the county of Ontario, at the June term of said court, held in said village on the third Tuesday of June, one thousand eight hundred and sixty-seven.

Witness the honorable Samuel Nelson, one of the judges of said court.

AUGUSTUS A. BOYCE, *Clerk.*

NORTHERN DISTRICT OF NEW YORK, *ss:*

Be it remembered that heretofore, to wit, on the sixth day of May, one thousand eight hundred and sixty-four, the Blossburg and Corning Railroad Company commenced its action in the supreme
2 court of the State of New York against the Tioga Railroad Company, and the said Tioga Railroad Company, in pursuance of the statute in such case made and provided, cause the said action to be removed into the circuit court of the United States for the northern district of New York; and thereupon, heretofore, to wit, at the adjourned term of October term, in the year one thousand eight hundred and sixty-four, in the said circuit court of the United States for the northern district of New York, the said Blossburg and Corning Railroad Company declared against the said Tioga Railroad Company as follows:

3 In the circuit court of the United States for the northern district of New York, of March, 1865. Adjourned term of October term, in the year one thousand eight hundred and sixty-four.

NORTHERN DISTRICT OF NEW YORK,
Steuben County, ss:

The Blossburg and Corning Railroad Company, plaintiff in this action, by D. Rumsey, their attorney, complain of the Tioga Railroad Company, the defendants in this action, of a plea of trespass on the case. For that, whereas the said plaintiffs are, and at the times hereinafter mentioned were, a corporation duly organized and doing business under the laws of the State of New York; and the said defendants are, and during all the time aforesaid were, a corporation duly organized and doing business under the laws of the State of Pennsylvania. And the said plaintiffs further say that, by an act of the legislature of the State of New York, passed on the ninth day of April, 1828, the Tioga Coal, Iron, Mining and Manufacturing Company was duly created a corporation, and continued to exist and exercise its corporate powers under the name and title aforesaid until the fifth day of April, 1851,
4 when, by an act of the legislature of the State of New York, passed on the day last aforesaid, it was enacted that the said Tioga Coal, Iron, Mining and Manufacturing Company should be thereafter known by the name of the Corning and Blossburg Railroad Company; and the said corporation hath since that time been known and called by the name last aforesaid. And the said plaintiffs further say that heretofore, to wit, on the 29th day of July, 1851, at Corning, in the county of Steuben, and State of New York, the said Corning and Blossburg Railroad Company, so being such corporation duly organized and doing business

at Corning aforesaid under the laws of the State of New York, and, as such, were the owners of, and lawfully seized and possessed of, a certain railroad, with the franchises and appurtenances thereunto belonging; and being so seized and possessed thereof, heretofore, to wit, on the day and year, and at the place aforesaid, by a certain lease, instrument, or agreement in writing, then and there duly made and executed between the said Corning and Blossburg Railroad Company, of the one part, and the said defendants of the other part, it was agreed, among other things, in substance and effect, as follows, viz: The said Corning and Blossburg Railroad Company agreed to use all due exertion to have the track of their railroad relaid with heavy iron rail, similar to those in use on the New York and Erie railroad, or the pattern called the continuous rail, such as is manufactured by J. T. Winslow, of Troy; and to maintain and keep the same in repair when so relaid. The said Corning and Blossburg Railroad Company to furnish, free of charge to the said defendant, suitable grounds in the village of Corning for the necessary depots, machine-shops, and engine-houses, with sufficient grounds at or near the depot of the New York and Erie railroad, and also upon
5 the river front, at some convenient point, and necessary facilities for the business of the railroad of the said companies, not including the coal and lumber business of the Tioga Railroad Company, and also free of charge to each, maintain and repair the necessary depots, machine-shops, and engine-houses, at suitable and proper places upon the ground so to be furnished; and also to erect, maintain, and keep in order the necessary water-stations and apparatus, at suitable points between Corning and the State-line. And in and by said agreement it was further understood and agreed that the principal repairs of engines, cars, &c., should be made at the machine-shops, &c., so to be erected at the village of Corning; and in and by said agreement the said defendants agreed, on their part, to use all due diligence to have the track of their railroad from Blossburg to the State-line relaid with heavy iron rails of the description of one of the kinds above specified, and to maintain and keep the same in repair when so relaid; and in and by the said agreement the said defendants also agreed that, when the track of the said railroad shall be completely relaid, and the depots, machine-shops, and engine-houses, water-stations, and apparatus, built and ready for use as above, provided they would purchase from the owners of the same the locomotives, machinery, and cars then in use on the railroad of the said companies at a cash valuation to be made by disinterested persons—each party choosing one, and, in case such persons could not agree, they to be at liberty to choose a third—and to pay for the same in the preferred certificates of loans of the defendants, bearing seven per cent. interest; and in and by the said agreement the said defendants further agreed that, when the said railroad should be relaid and ready for use as aforesaid, they, the said defendants, would operate the same
6 from Corning to Blossburg, for the purpose of transporting passengers, mails, coal, lumber, merchandise, and such other freights as should be furnished for transportation upon the said railroad, and for that purpose should furnish and provide, maintain, and keep in repair the necessary motive power, engines, machinery, and cars (nevertheless they, the defendants, should not be bound to furnish coal-cars) for all the regular business that should be furnished to said railroad.

And in and by said agreement it was further agreed that uniform rates of toll and charges for transportation of passengers, mails, and freights on and upon the said railroad shall be established annually by the mutual agreement of the said companies; and, in case of disagree-

ment between them, such rates of toll and charges should be settled by disinterested persons—each party choosing one, and, in case such persons could not agree, they to be at liberty to choose a third. And for the use of the said railroad of the said Corning and Blossburg Railroad Company, and the use of their depots, engine-houses, machine-shops, grounds, water-stations, &c., the said defendants agreed to pay to the Corning and Blossburg Railroad Company two-thirds of the receipts for passengers, mails, and freights, which shall be taken for the said Corning and Blossburg Railroad, the expenses charged customers for the loading and unloading coal, lumber, and other freight, and for warehousing, and such additional charges by way of discrimination, as should be made for short distances for motive-power, not to be included in the term receipts, as above mentioned, payments for all cash business to be made at the expiration of each and every month from the commencement of the said agreement, and of all amounts within thirty days from the expiration of each and every month, as aforesaid; and the said defendants were to furnish to the said Corning and Blossburg Railroad Company, way-bills of all the passengers, freights,
7 &c., passing over the said road during each and every month, at the expiration thereof. And it was further understood and agreed in and by said agreement, that the said arrangement for running and operating the said railroad should continue for ten years after the said railroad should be relaid and ready for use.

And the said plaintiffs further say that afterwards, to wit, on the 23d day of October, 1852, at Corning aforesaid, a certain other agreement in writing was made by and between the said Corning and Blossburg Railroad Company, and the said defendants, in and by which it was recited, in substance and effect, that on the 29th day of July, 1851, the said parties had made and entered into the said above-mentioned and recited agreement, and that differences had arisen in relation to the same, and that the said parties thereto had agreed to modify the same, and the said defendants did, in and by the said last-mentioned agreement, agree to take the railroad of the said Corning and Blossburg Railroad Company, in its then present condition, to slope, surface, ditch, complete, and finish the same, and do everything necessary to fit the same for use, according to the terms and conditions of the said first-mentioned contract.

And the said defendants, in and by said last-mentioned agreement, further agreed to put in a proper and fit condition for use, all the water-stations on the railroad of the said Corning and Blossburg Railroad Company, west of Corning. And in and by the said last-mentioned contract, the said defendants did further agree that after the iron should be laid upon the same, the said defendants would slope, surface, ditch, and finish in a proper and suitable manner the turn-outs and branches of the said Corning and Blossburg Railroad, on the line of the same, and at the village of Corning; and the said Corning
8 and Blossburg Railroad Company did, in and by said last-mentioned agreement, agree to construct two turn-outs on the line of the said railroad, at such places as the said defendants should direct, but the said defendants should pay any additional expense of grading which shall be incurred in consequence of any change of present locations.

And the said Corning and Blossburg Railroad Company did further agree to fix and put in proper condition their water-tanks at the village of Corning, and to continue the track of their railroad, so as to connect with the branches of the Buffalo, Corning and New York, and the New

York and Erie Railroad, below the village of Corning; and also to complete and finish the depots, machine-shops, and engine-houses; and the necessary tracks to and through the same, with a turn-table or a Y, for the purpose of turning engines. And the said Corning and Blossburg Railroad Company further agreed to secure the bank on the river side, at or near the point of the hill above the village of Corning, by sloping and riprapping the said bank, and also the bank at or near Ryer's Eddy, by piles and brush and stones. And in and by said last-mentioned agreement, it was further agreed that, in consideration of the completing and finishing of the said railroad of the said Corning and Blossburg Railroad Company, as in the said contract before specified, the said defendants were to receive three hundred dollars per mile, to be reserved out of the first earnings of the Corning and Blossburg Railroad under said contract, and that the length of the said railroad, for the purpose of determining the said compensation, as well as the compensation for repairs thereinafter specified, was thereby fixed at fifteen miles. And the said defendants did, in and by said contract, further agree that, when the track and branches of the said Corning and Blossburg Railroad should be completed and finished, as
9 thereinbefore specified, to keep and maintain the same in good condition and repair during the continuance of the said contract, in consideration of which the said defendant should receive two hundred and fifty dollars per mile, per annum, to be reserved in equal monthly payments out of the earnings of the said Corning and Blossburg Railroad Company, during the continuance of the said contract as aforesaid: and the said defendants further agreed to build and maintain on each side of said Corning and Blossburg Railroad all fences which should be necessary, for which the said defendants should receive seventy-five cents per rod, for all fences they should so build, to be reserved out of said earnings of the said Corning and Blossburg Railroad, which said sum of seventy-five cents per rod was to cover the building and maintaining the said fences during the continuance of the said contract. And the said plaintiffs further say that afterwards, to wit, on the 15th day of January, 1853, at Corning aforesaid, by a certain agreement in writing duly made and executed, by and between the said Corning and Blossburg Railroad Company and the said defendants, and endorsed upon the said last-mentioned contract, the said defendants agreed to secure the bank at or near Ryer's Eddy, by gravel stones and riprapping, for the sum of twelve hundred dollars, to be paid out of the earnings of the Corning and Blossburg Railroad Company, as was provided in said contract, for the completion of the Corning and Blossburg railroad and the said Corning and Blossburgh Railroad Company was thereby released *for* any liability for or on account of said work at Ryer's Eddy.

And the said plaintiffs further say that the said Corning and Blossburg Railroad Company, afterwards, to wit, on the first day of
10 October, 1852, at Corning, aforesaid, did relay the track of their said railroad, and fully and in all things performed all and singular the agreements and conditions on their part, in and by the said contract first above recited, and the several agreements above mentioned modifying the same, to be performed, and the said defendants afterwards, to wit, on the day and year, and at the place aforesaid, took possession of, accepted and received the said railroad of the said Corning and Blossburg Railroad Company, with the depots, engine-houses, machine-shops, grounds, under and in pursuance of the terms and provisions of the said contracts or agreements, as relaid and ready for use,

and from the time last aforesaid the said defendants occupied and operated, and continued to occupy and operate the same for the full end and term of ten years thereafter. And the said plaintiffs further say, that heretofore, to wit, at May term, in the year one thousand eight hundred and forty-four, by the consideration and judgment of the Supreme Court of the State of New York, Hiram W. Bostwick, James R. Wilson, and Lewis Saynish recovered a judgment in the said court for thirty-one thousand nine hundred and ninety-four dollars and twenty-nine cents damages and costs, against the Tioga Coal, Iron, Mining and Manufacturing Company, as appears by the record thereof then remaining in the office of the clerk of said court, in the city of New York.

And the said plaintiffs further say that afterwards, to wit, on the 23d day of October, 1852, at Corning, in the county of Steuben, the said Bostwick, Wilson, and Saynish, in pursuance of the statute of the State of New York, in such case made and provided, caused to be issued upon the said judgment an execution against the property of the said Tioga Coal, Iron, Mining and Manufacturing Company, directed to the
11 sheriff of the county of Steuben in said State, in and by which, after reciting the recovery and docketing of the said judgment as aforesaid, in said county of Steuben, on the 7th day of June, 1844, the said sheriff was commanded to satisfy the said judgment out of the personal property of the defendants therein named in his county, or if sufficient personal property could not be found, then out of the real property belonging to the said defendants, on the day when the said judgment was so docketed in the said county of Steuben, or at any time afterwards, in whose hands soever the same might be, and that he return the said execution within six days, to the clerk of Steuben County, which said execution was duly endorsed with a direction to the said sheriff to collect $31,994.29, with interest from May 22d, 1844, and his fees, and was afterwards, to wit, on the 25th day of October, 1852, at Corning aforesaid, duly delivered to the sheriff of the county of Steuben, to be executed in due form of law. And the said plaintiffs further say that the said sheriff of the county of Steuben, for want of sufficient personal property of the said Tioga Coal, Iron, Mining and Manufacturing Company from which to satisfy the money, which in and by said execution he was directed to collect, did levy upon, seize, and take the railroad of the said company with all the road-way, tracks, cross-ties, water-stations, rails, fixtures, erections, privileges, and franchises thereon or belonging, or in any way appertaining thereto. And having duly advertised the same according to law, afterwards, to wit, on the 31st day of December, 1852, at Bath, in the county of Steuben, duly sold the same at public auction, and at such sale the same were struck off and sold to John Magee for the sum of $51,936.34. And the said plaintiffs further say that afterwards, to wit, on the first day of April, 1854, at Bath, in the county of
12 Steuben, the said railroad, with its road-bed, fixtures, and appurtenances as aforesaid, remaining entirely unredeemed from the effect of such sale, so made as aforesaid, the sheriff of the county of Steuben by his certain indenture, bearing date that day and executed under his hand and seal according to law, did grant and convey to the said John Magee, his heirs and assigns forever, all the estate, right, title and interest, which the said Tioga Coal, Iron, Mining and Manufacturing Company, had in and to the said railroad, with all the tracks, cross-ties, water-stations, rails, buildings, fixtures, privileges, and franchise connected therewith, whereby the said John Magee became and was seized in fee of the said railroad with all its fixtures and appurtenances, and being so seized thereof the said John Magee and Arabella,

his wife, afterwards, to wit, on the 13th day of June, 1854, at Corning aforesaid, by their certain indenture bearing date that day, did grant, bargain, sell, and convey unto the said plaintiffs, their successors and assigns, the said above described railroad with all the tracks, cross-ties, water-stations, rails, buildings, fixtures, privileges, and franchises connected therewith, whereby the said plaintiffs became and were duly seized in fee, of the said railroad, with all its fixtures and appurtenances. And the said plaintiffs further say, that heretofore, to wit, on the 22d day of March, 1854, at Corning aforesaid, in and by a certain instrument in writing, duly made and executed by the said Corning and Blossburg Railroad Company, under their corporate seal, it was amongst other things recited that the said Corning and Blossburg Railroad Company had, on the 23d day of November, 1853, duly assigned to John Magee the said contract or lease hereinbefore recited, as collateral security for the payment of certain money due from the Corning and Blossburg Railroad Company to said Magee, and that the land and premises on which the road-track of said company
13 was located, with the road, fixtures and appurtenances thereon and thereto belonging, were, on the 31st day of December, 1852, sold by the sheriff of the county of Steuben by virtue of a judgment and execution against said company, and at such sale were bid off by John Magee, and at the time during which the said company had the right to redeem the same from said sale as judgment-debtors had expired, and the same had not been redeemed by said company; and therefore, in consideration of the premises therein contained and of an agreement on the day last aforesaid, executed by said Magee, to carry out and perform the said contracts and lease on the part of said Corning and Blossburg Railroad Company, and to secure the running and operating of the railroad of said company, and in good faith, so far as might be, to place the said John Magee in a situation where he might fully carry out and perform the said contract and lease, so far as the performance depended upon the Corning and Blossburg Railroad Company, and thus to secure to the defendants all the rights, benefits, and privileges to which they might be entitled under said contracts, the said Corning and Blossburg Railroad Company did thereby sell, assign, transfer, and set over to the said John Magee (subject to the assignment so as aforesaid made by said Corning and Blossburg Railroad Company to said John Magee) the said several contracts with the defendants, and all the right and interest which the said Corning and Blossburg Railroad Company had in the same, so far as relates to the running and operating of the said railroad.

And the said plaintiffs further say that, heretofore, to wit, on the 13th day of June, 1854, at Corning aforesaid, by a certain instrument in writing, duly made and executed under the hand and seal of the said John Magee, it was, amongst other things, recited that, by a certain
14 agreement, made the 29th day of July, 1851, between the Corning and Blossburg Railroad Company and the defendants, and a further agreement modifying the same, made between the same parties on the 23d day of October, 1852, the said defendants, among other things, agreed to stock and run the railroad of the Corning and Blossburg Railroad Company in connection with the Tioga railroad, for the term of ten years, and that said contracts were, on the 2d day of March, 1854, duly assigned by the said Corning and Blossburg Railroad Company to the said John Magee, and that the said plaintiffs had become by purchase the owners of the railroad heretofore owned by the Corning and Blossburg Railroad Company, the said John Magee did, and by

the said instrument in writing, in consideration of the premises therein recited and of the sum of ten dollars to him in hand paid by the plaintiffs, sell, assign, transfer, and set over to the said plaintiffs all his right, title, and interest of, in, and to the said above-recited contracts with the said defendants; and it was in and by the said last-mentioned instrument in writing provided that nothing therein contained should be so construed as to entitle the said plaintiffs to all or any portion of the money which had accrued and become payable, under and by virtue of the said contracts, on or before the 1st day of June, 1854, but the same, and the right to collect the same as might be necessary, "were expressly saved and reserved from the effect of the said instrument in writing," by means of which said above-recited premises the said plaintiffs afterwards, to wit, on the 13th day of June, 1854, at Corning aforesaid, became, and were and still are, seized in fee of the said railroad, with all the tracks, cross-ties, water-stations, rails, buildings, fixtures,
15 privileges, franchises, and reversions connected therewith, and the owners of the said contracts so as aforesaid made between the said Corning and Blossburg Railroad Company and the said defendants; of all which said several premises the said defendants afterward, to wit, on the day and year, and at the place last aforesaid, had notice.

And the said plaintiffs further say that the said defendants afterwards, to wit, on the first day of July, 1854, at Corning aforesaid, and on divers other days since that time, and before the commencement of this action, have paid over to the said plaintiffs, as assignees of and owners of said railroad, and of said contracts and lease, divers portions of the receipts for passengers, mails, and freights, which had been taken by the defendants for the said Corning and Blossburg Railroad under and in pursuance of said contracts, and on account thereof, and of the moneys which in and by the said contracts and lease the said defendants agreed to pay for the use of the said Corning and Blossburg Railroad and its appurtenances.

And the said plaintiffs further say that, heretofore, to wit, on the 13th day of June, 1854, and before the time of the assignment of the said contracts by said Magee to the plaintiffs as aforesaid, at Corning aforesaid, the said defendants had received and reserved from the earnings of the said Corning and Blossburg Railroad sufficient sums of money to pay them in full the several sums which they were, under the said contracts, entitled to reserve from the earnings of the said railroad, including the amount the said defendants were up to that time entitled to reserve monthly for repairs, as provided in and by the terms of said contracts.

And the said plaintiffs further say that the said defendants, to wit, at Corning aforesaid, have received for passengers, mails, and freights, which were taken for the said Corning and Blossburg railroad
16 between the first day of January, 1855, and the first day of October, 1862, a large amount of money, to wit, the sum of five hundred thousand dollars, over and above the several sums, which the said defendants, under and in pursuance of the provisions of said contract were entitled to reserve in monthly payments for repairs, upon the said Corning and Blossburg railroad, according to the terms and provisions of the said contracts, yet the said defendants, although often requested so to do, have neglected and refused, and still do neglect and refuse to pay to the said plaintiffs two-thirds of all said receipts for passengers, mails, and freights, which were so taken for the said Corning and Blossburg railroad, during the time aforesaid, at the times and in the manner in said contracts for that purpose specified, or in any other manner whatever.

And the said plaintiffs further say that the said defendants during the time last aforesaid have also neglected and refused to furnish to the said Corning and Blossburg Railroad Company, or to the said plaintiffs, way-bills of all the passengers, freights, &c., which passed over the said railroad during each and every month, at the expiration thereof, to wit, at Corning aforesaid; and the said plaintiffs further say that the said defendants did not, nor would keep and maintain the said Corning and Blossburg Railroad in good condition and repair, during the continuance of the said contract, nor did they build and maintain on each side of the said Corning and Blossburg Railroad, all fences which were necessary, as in and by the terms and provisions of the said contract they were required to do.

But, on the contrary thereof, they, the said defendants, after the making of the said contracts, and during the continuance of the said term of ten years therein mentioned, and while said defendants were possessed of the said railroad with its appurtenances as afore-
17 said, to wit, on the first day of September, 1852, at Corning aforesaid, and from thence for a long space of time, to wit, from thence until and at the termination of the said term of ten years, suffered and permitted the said railroad and fences, and the rails, ties, trestle-work, cattle-guards, creek-crossings, culverts, and bridges of the said railroad to be, and continue, and the same were for and during all that time and at the termination of said term of ten years, ruinous, worn out, prostrate, fallen down, in great decay, and in bad condition and out of repair, and the ditches of the said railroad during all that time, and at the termination of said term, to be and continue foul, miry, choked up, and ruinous, and in bad condition and out of repair, and at the termination of the said term of ten years the said defendants delivered up the said railroad with its appurtenances unto the said plaintiffs, in such order and condition as last aforesaid, contrary to the form and effect of the said contracts and lease, in that behalf, as aforesaid, to wit, at Corning aforesaid.

And whereas, also, the said plaintiffs are, and at the time hereinafter mentioned were, a corporation duly organized and doing business under the laws of the State of New York, and the said defendants are, and during all the time aforesaid were, a corporation duly organized and doing business under the laws of the State of Pennsylvania. And the said plaintiffs further say that, heretofore, to wit, on the 29th day of July, 1851, at Corning, in the county of Steuben and State of New York, the Corning and Blossburg Railroad Company was a corporation duly organized and doing business, at Corning aforesaid, under the laws of the State of New York, and, as such, were the owners of and lawfully seized and possessed of a certain railroad, with the
18 franchises and appurtenances thereunto belonging, and being so seized and possessed thereof heretofore, to wit, on the day and year and at the place aforesaid, by a certain lease, instrument, or agreement in writing, then and there duly made and executed, between the said Corning and Blossburg Railroad Company of the one part, and the said defendants of the other part, it was, amongst other things, agreed in substance and effect, as follows, viz: The said Corning and Blossburg Railroad Company agreed to use all due execution to have the track of their railroad relaid with heavy iron rail', similar to those in use on the New York and Erie Railroad, or the pattern called the continuous rail, such as is manufactured by J. T. Winslow of Troy, and to maintain and keep the same in repair when so relaid. The said Corning and Blossburg Railroad Company to furnish, free of charge, to the

said defendants, suitable grounds in the village of Corning for the necessary depots, machine-shops, and engine-houses, with sufficient grounds, at or near the depot of the New York and Erie Railroad, and also upon the river-front, at some convenient point, and necessary facilities for the business of the railroad of the said companies, not including the coal and lumber business of the Tioga Railroad Company; and, also, free of charge to each, maintain and repair the necessary depots, machine-shops, and engine-houses, at suitable and proper places upon the ground so to be furnished, and also to erect, maintain, and keep in order the necessary water-stations and apparatus at suitable points between Corning and the State line. And in and by said agreement it was further understood and agreed that the principal repairs of engines, cars, &c., should be made at the machine-shops, &c., to be erected at the village of Corning. And in and by said agreement the said defendants agreed on their part to use all due diligence to have the
19 track of their railroad, from Blossburg to the State line, relaid with heavy iron rails of the description of one of the kinds above specified, and to maintain and keep the same in repair, when so relaid. And, in and by the said agreement, the defendants also agreed that, when the track of the said railroad shall be completely relaid, and the depots, machine-shops, and engine-houses, water-stations, and apparatus, built and ready for use, as above provided, they would purchase, from the owners of the same, the locomotives, machinery, and cars, then in use on the railroad of the said companies, at a cash valuation, to be made by disinterested persons, each party choosing one, and, in case such persons could not agree, they to be at liberty to choose a third, and to pay for the same in the preferred certificates of *law* of the defendants, bearing seven per cent. interest. And, in and by the said agreement, the said defendants further agreed that, when the said railroad should be relaid and ready for use as aforesaid, they, the said defendants, would operate the same from Corning to Blossburg, for the purpose of transporting passengers, mails, coal, lumber, merchandise, and such other freight as should be furnished for transportation upon the said railroad, and, for that purpose, should furnish, provide, and maintain, and keep in repair, the necessary motive-power, engines, machinery, and cars, (nevertheless they, the defendants, should not be bound to furnish coal-cars,) for all the regular business that should be furnished to said railroad. And, in and by said agreement, it was further agreed that uniform rates of toll, and charges for transportation of passengers, mails, and freights, on and upon the said railroad, shall be established annually, by the mutual agreement of the said companies, and, in case of disagreement between them, such rates of toll and charges should be settled by disinterested persons, each party choosing one, and, in
20 case such persons could not agree, they to be at liberty to choose a third; and for the use of the said railroad of the said Corning and Blossburg Railroad Company, and the use of their depots, engine-houses, machine-shops, grounds, water-stations, &c., the said defendants agreed to pay, to the Corning and Blossburg Railroad Company, two-thirds of the receipts for passengers, mails, and freights, which shall be taken for the said Corning and Blossburg Railroad, the expenses charged customers for the loading and unloading coal, lumber, and other freight, and for warehousing, and such additional charges by way of discrimination as should be made for short distances for motive-power, not to be included in the term receipts as above mentioned, payments for all cash business to be made at the expiration of each and every month, from the commencement of the said agreement, and of

all amounts, within thirty days from the expiration of each and every month as aforesaid; and the said defendants were to furnish to the said Corning and Blossburg Railroad Company way-bills of all the passengers, freights, &c., passing over the said road, during each and every month at the expiration thereof. And it was further understood and agreed, in and by said agreement, that the said arrangement for running and operating the said railroad, should continue for ten years after the said railroad should be relaid and ready for use.

And the said plaintiffs further say that, afterwards, to wit, on the 23d day of October, 1852, at Corning aforesaid, a certain other agreement in writing was made, by and between the said Corning and Blossburg Railroad Company, and the said defendants, in and by which it was recited, in substance and effect, that, on the 29th day of July, 1851, the said parties had made and entered into the said above-mentioned and recited agreement, and that differences had arisen in relation to the same, and that the said parties thereto had agreed to
21 modify the same, and the said defendants did, in and by the said last-mentioned agreement, agree to take the railroad of the said Corning and Blossburg Railroad Company, in its then present condition, to slope, surface, ditch, complete, and finish the same, and do everything necessary to fit the same for use, and according to the terms and conditions of the said first-mentioned contract; and the said defendants, in and by said last-mentioned agreement, further agreed to put in a proper and fit condition for use, all the water-stations on the railroad of the said Corning and Blossburg Railroad Company west of Corning. And in and by said last-mentioned contract the said defendants did further agree, that after the iron should be laid upon the same, the said defendants would slope, surface, ditch, and finish in a proper and suitable manner, the turnouts and branches of the said Corning and Blossburg Railroad on the line of the same, and at the village of Corning, and the said Corning and Blossburg Railroad Company did, in and by said last-mentioned agreement, agree to construct two turnouts on the line of the said railroad, at such places as the said defendants should direct, but the said defendants should pay any additional expense of grading which shall be incurred in consequence of any change of present locations. And the said Corning and Blossburg Railroad Company did further agree to fix and put in proper condition their water-tanks at the village of Corning, and to continue the track of their railroad so as to connect with the branches of the Buffalo, Corning and New York, and New York and Erie Railroad below the village of Corning, and also to complete and finish the depots, machine-shops, and engine-houses, and the necessary tracks to and through the same, with a turn-table, or a Y, for the purpose of turning engines, and the said Corning and Blossburg
22 Railroad Company further agreed to secure the bank on the river-side, at or near the point of the hill above the village of Corning by sloping and riprapping the said bank, and also the bank at or near Ryer's Eddy, by piles and brush and stones, and in and by said last-mentioned agreement, it was further agreed, that in consideration of the completing and finishing of the said railroad of the said Corning and Blossburg Railroad Company, as in the said contract before specified, the said defendants were to receive three hundred dollars per mile, to be reserved out of the first earnings of the Corning and Blossburg Railroad under said contract, and that the length of the said railroad, for the purpose of determining the said compensation, as well as the compensation for repairs thereinafter specified, was thereby fixed at fifteen miles; and the said defendants did, in and by said contract, further

agree, that when the track and branches of the said Corning and Blossburg Railroad should be completed and finished, as thereinbefore specified, to keep and maintain the same in good condition and repair, during the continuance of the said contract, in consideration of which the said defendants should receive two hundred and fifty dollars per mile per annum, to be reserved in equal monthly payments out of the earnings of the said Corning and Blossburg Railroad, during the continuance of the said contract as aforesaid; and the said defendants further agreed to build and maintain on each side of said Corning and Blossburg Railroad all fences which should be necessary, for which the said defendants should receive seventy-five cents per rod, for all fences they should so build, to be reserved out of said earnings of the said Corning and Blossburg Railroad, which said sum of seventy-five cents per rod was to cover the building and maintaining the said fences during the continuance of the said
23 contract. And the said plaintiffs further say that afterwards, to wit, on the 15th day of January, 1853, at Corning aforesaid, by a certain instrument in writing, duly made and executed by and between the said Corning and Blossburg Railroad Company, and the said defendants, and endorsed upon the said last-mentioned contract, the said defendants agreed to secure the bank at or near Ryer's Eddy, by gravelstones and riprapping for the sum of twelve hundred dollars, to be paid out of the earnings of the Corning and Blossburg Railroad, as was provided in said contract for the completion of the Corning and Blossburg Railroad, and the said Corning and Blossburg Railroad Company were thereby released from any liability, for or on account of said work at Ryer's Eddy. And the said plaintiffs further say that the said Corning and Blossburg Railroad Company, afterwards, to wit, on the first day of October, 1852, at Corning aforesaid, did relay the track of their said railroad, and fully and in all things performed all and singular the agreements and conditions on their part, in and by the said contract first above recited, and the several agreements above mentioned modifying the same, to be performed, and the said defendants afterwards, to wit, on the day and year and at the place aforesaid, took possession of, accepted, and received the said railroad of the said Corning and Blossburg Railroad Company, with the depots, engine-houses, machine-shops, grounds, under and in pursuance of the terms and provisions of the said contracts or agreements as relaid and ready for use, and from the time last aforesaid the said defendants occupied and operated, and continued to occupy and operate the same for the full end and term of ten years thereafter. And the said plaintiffs further say that heretofore, to wit, on the 22d day of March, 1854, at Corning aforesaid, in and by a certain instrument in writing, duly made and executed
24 by the said Corning and Blossburg Railroad Company under their corporate seal, it was, amongst other things, recited that the said Corning and Blossburg Railroad Company had, on the 23d day of November, 1853, duly assigned to John Magee the said contract or lease hereinbefore recited, as collateral security for the payment of certain money due from said Corning and Blossburg Railroad Company to said Magee, and that the land and premises on which the road-track of said company was located, with the road, fixtures, and appurtenances thereon and thereto belonging, were on the 31st day of December, 1852, sold by the sheriff of the county of Steuben, by virtue of a judgment and execution against said company, and at such sale were bid off by John Magee, and the time during which the said company had the right to redeem the same for said sale as judgment-debtors had expired, and the same had not been redeemed by said company, and therefore, in

consideration of the premises therein contained, and of an agreement on the day last aforesaid, executed by said Magee, to carry out and perform the said contracts and lease on the part of the said Corning and Blossburg Railroad Company, and to secure the running and operating of the railroad of said company, and in good faith, so far as might be, to place the said John Magee in a situation where he might fully carry out and perform the said contract and lease, so far as the performance depended upon the Corning and Blossburg Railroad Company, and thus to secure to the defendants all the rights, benefits, and privileges to which they might be entitled under the said contract, the said Corning and Blossburg Railroad Company did thereby sell, assign, transfer, and set over to the said John Magee (subject to the assignment so as aforesaid made by said Corning and Blossburg Railroad Company to said John Ma-
25 gee) the said several contracts with the defendants, and all the right and interest which the said Corning and Blossburg Railroad Company had in the same, so far as related to the running and operating the said railroad.

And the said plaintiffs further say that heretofore, to wit, on the 13th day of June, 1854, at Corning aforesaid, by a certain instrument in writing duly made and executed under the hand and seal of the said John Magee, it was, amongst other things, recited that, by a certain agreement made the 29th day of July, 1851, between the Corning and Blossburg Railroad Company and the defendants, and a further agreement modifying the same made between the same parties on the 23d day of October, 1852, the said defendants, amongst other things, agreed to stock and run the railroad of the Corning and Blossburg Railroad Company in connection with the Tioga Railroad for the term of ten years, and that said contracts were, on the 22d day of March, 1854, duly assigned by the said Corning and Blossburg Railroad Company to the said John Magee, and that the said plaintiffs had become by purchase the owners of the railroad theretofore owned by the Corning and Blossburg Railroad Company. The said John Magee did, in and by the said instrument in writing, in consideration of the premises therein recited, and of the sum of ten dollars to him in hand paid by the plaintiffs, sell, assign, transfer, and set over to the said plaintiffs all his right, title, and interest of, in, and to the said therein above recited contracts with the said defendants, and it was, in and by said last-mentioned instrument in writing, provided that nothing therein contained should be so construed as to entitle the said plaintiffs to all or any portion of the money which had accrued and become payable under and by virtue of the said contracts on or before the first
26 day of June, 1854, but the same, and the right to collect the same, as might be necessary, were expressly saved and reserved for the effect of the said instrument in writing. And the said plaintiffs further say that heretofore, to wit, on the 29th day of November, 1852, at Corning aforesaid, the said Corning and Blossburg Railroad Company, by their certain indenture of mortgage, bearing date on that day, did grant, bargain, sell, assign, and set over, amongst other things, to the said John Magee, his heirs and assigns, all and singular the said Corning and Blossburg Railroad of the said Corning and Blossburg Railroad Company, situate in the county of Steuben and State of New York, and extending from the village of Corning, in said county, to the Pennsylvania State-line, together with the land, track, lines, rails, bridges, ways, buildings, erections, fences, walls, fixtures, privileges, franchises, and real-estate whatever, then owned by the said Corning and Blossburg Railroad Company. And in and by the said indenture of mortgage it was declared that the same was intended as a mortgage to secure the payment of the sum of twenty-five

thousand dollars, payable one-half in twelve months and one-half in twenty-four months from the first day of January, 1853, with interest at the rate of seven per cent., payable semi-annually, according to the condition of a certain bond bearing even date with the said mortgage executed by the said Corning and Blossburg Railroad Company to the said John Magee, and which payments, if duly made, would render the said indenture void. But in case default should be made in the payment of the principal or interest, it was provided in said indenture that then and from thenceforth it should be lawful for the said John Magee, amongst other things, to sell and dispose of said premises, and all benefit and equity of redemption of the said Corning and Blossburg Railroad Company, at public auction, according to the statute in such case made and provided, and as the attorney of the said Corning and Blossburg Railroad Company, by the said indenture for that purpose duly constituted, to make and deliver to the purchaser or purchasers thereof good and sufficient deed or deeds of conveyance of the same in fee-simple, which sale should be a perpetual bar against the said Corning and Blossburg Railroad Company, and all persons claiming by, from, or under them or any of them.

27

And the said plaintiffs further say that afterwards, to wit, on the 13th day of April, 1855, at Corning aforesaid, the said Corning and Blossburg Railroad Company failed, and made default in the payment of the said sum of money in said bond and mortgage mentioned, and on the day last aforesaid there remained due and unpaid of the said money a large sum, to wit, the sum of $16,319.89; and thereupon the said John Magee, on the day last aforesaid, caused and procured to be published in the Corning Journal, a newspaper published at Corning, Steuben County, a notice pursuant to the statute of the State of New York, in such case made and provided, that the said mortgaged property would be sold at public auction, at the Dickinson House, in the village of Corning aforesaid, on the seventh day of July, 1855, at two o'clock in the afternoon, which said notice was duly published, served, and posted, pursuant to the provisions of the statute aforesaid. And the said plaintiffs further say that afterwards, and on the day and at the place specified in said notice of the sale thereof, the said mortgaged property was duly sold at public auction, and on such sale was struck off and sold to the plaintiffs for the sum of sixteen thousand six hundred and thirteen and forty-seven one hundredths dollars, that being the highest sum bid therefor, and the plaintiffs being the bidder. And the said plaintiffs further say that afterwards, to wit, on the seventh day of July, 1855, at Corning aforesaid, affidavits of the due publication of said notice of sale, of the posting and service thereof, and of the fact of such sale, were duly made, and the same were afterwards, to wit, on the ninth day of July, 1855, at Bath, in said county, duly recorded at length in the book kept for the record of mortgages in the office of the clerk of the county of Steuben, pursuant to the provisions of the statute aforesaid; by means whereof, and by force of the statute of the State of New York in such case made and provided, the said plaintiffs became and were, and still are, seized in fee of the said railroad of the said Corning and Blossburg Railroad Company, and all the other property mentioned and described in the said indenture of mortgage, being the same identical property mentioned and described in the said contracts so made between the Corning and Blossburg Railroad Company and the defendants as aforesaid; of all which said several premises the said defendants afterwards, to wit, on the day and year and at the place aforesaid had notice. And the said plaintiffs further

28

say that the said defendants afterwards, to wit, on the first day of July, 1854, at Corning aforesaid, and on divers other days since that time, and before the commencement of this action, have paid over to the said plaintiffs, as assignees and owners of the said railroad, and of the said contracts and leases, divers portions of the receipts for passengers, mails, and freights, which had been taken by the defendants for the said Corning and Blossburg Railroad under and in pursuance of said contracts, and on account thereof, and of the moneys which in and by the said contracts and lease, the said defendants agreed to pay for the use of the said Corning and Blossburg Railroad and its appurtenances.

And the said plaintiffs further say that heretofore, to wit, on
29 the thirteenth day of June, 1854, and before the time of the assignment of the said contracts by said John Magee to the plaintiffs as aforesaid, at Corning aforesaid, the said defendants had received and reserved from the earnings of the said Corning and Blossburg Railroad sufficient sums of money to pay them in full the several sums which they were, under the said contract, entitled to reserve from the earnings of the said railroad, including the amount the said defendants were, up to that time, entitled to reserve monthly for repairs as provided in and by the terms of said contract.

And the said plaintiffs further say that the said defendants, to wit, at Corning aforesaid, have received for passengers, mails, and freights, which were taken for the said Corning and Blossburg Railroad, between the first day of January, 1855, and the first day of October, 1862, a large amount of money, to wit, the sum of five hundred thousand dollars over and above the several sums which the said defendants, under and in pursuance of the said contracts, were entitled to reserve in monthly payments, for repairs upon the said Corning and Blossburg Railroad, according to the terms and provisions of the said contracts, yet the said defendants, although often requested so to do, have neglected and refused, and still do neglect and refuse, to pay to the said plaintiffs two-thirds of all of said receipts for passengers, mails, and freights, which were so taken for the said Corning and Blossburg Railroad during the time aforesaid, at the times and in the manner in the said contracts for that purpose specified, or in any other manner whatever.

And the said plaintiffs further say that the said defendants, during the term last aforesaid, have also neglected and refused to furnish to the said Corning and Blossburg Railroad Company, or to the said plaintiffs, way-bills of all the passengers, freights, &c., which
30 passed over the said railroad during each and every month, at the expiration thereof, to wit, at Corning aforesaid.

And the said plaintiffs further say that the said defendants did not, nor would keep and maintain the said Corning and Blossburg Railroad in good condition and repair during the continuance of the said contract; nor did they build and maintain on each side of the said Corning and Blossburg Railroad all fences which were necessary, as in and by the terms and provisions of said contract they were required to do; but, on the contrary thereof, they, the said defendants, after the making of the said contracts, and during the continuance of the said term of ten years, therein mentioned, and while the defendants were possessed of the said railroad, with its appurtenances as aforesaid, to wit, on the first day of September, 1852, at Corning aforesaid, and from thence for a long space of time, to wit, from thence until and at the termination of the said term of ten years, suffered and permitted the said railroad and fences, and the rails, ties, tres*sel*-works, cattle-guards, creek-crossings, culverts, and bridges of the said railroad, to be and continue, and the

same were, for and during all that time and at the termination of the said term of ten years, ruinous, worn out, prostrate, fallen down, in great decay, and in bad condition, and out of repair; and the ditches of the said railroad, during all that time, and at the termination of said term, to be and continue foul, miry, choked up, ruinous, in bad condition, and out of repair, and at the termination of the said term of ten years the said defendants delivered up the said railroad, with its appurtenances, unto the said plaintiffs, in such order and condition as last aforesaid, contrary to the form and effect of the said contracts and lease in that behalf, as aforesaid, to wit, at Corning aforesaid.

31 And also for that, whereas the said defendants afterwards, to wit, on the fifth day of May, 1864, at Corning, in the county of Steuben, were indebted to the said plaintiffs, in the sum of one hundred and fifty thousand dollars, for money by the said defendants, before that time, had and received to and for the use of the said plaintiffs, and for other money before that time due and owing from the said defendants to the said plaintiffs, for the use and occupation by the said defendants of a certain railroad, with its fixtures and appurtenances, by them the said defendants had and used for a long time before then elapsed, with the consent and permission of the said plaintiffs, and at the special instance and request of the said defendants; and being so indebted, they, the said defendants, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook, and then and there promised the said plaintiffs to pay them the said sum of money when they, the said defendants, should be thereunto afterwards requested. Yet the said defendants, although after requested, &c., have not yet paid the said plaintiffs the said several sums of money above mentioned, or any part thereof, but to pay the same or any part thereof to the said plaintiffs, they, the said defendants, have hitherto wholly refused, and still do refuse.

And whereas, also, the said plaintiffs are, and at the times hereinafter mentioned were, a corporation duly organized and doing business under the laws of the State of New York, and the said defendants are, and during all the time aforesaid were, a corporation duly organized and doing business under the laws of the State of Pennsylvania. And the said plaintiffs further say that heretofore, to wit, on the 29th day of July, 1851, at Corning, in the county of Steuben, and State of New York, the Corning and Blossburg Railroad Company was a corporation duly

32 organized and doing business at Corning aforesaid, under the laws of the State of New York, and as such were the owners of, and lawfully seized and possessed of, a certain railroad, with the franchise and appurtenances thereunto belonging, and being so seized and possessed thereof heretofore, to wit, on the day and year and at the place aforesaid, by a certain lease, instrument, or agreement in writing, then and there duly made and executed between the said Corning and Blossburg Railroad Company of the one part, and the said defendants of the other part, it was, amongst other things, agreed in substance and effect as follows, to wit: The said Corning and Blossburg Railroad Company agreed to use all due exertion to have the track of their railroad relaid with heavy iron rail', similar to those in use on the New York and Erie Railroad, or the pattern called the continuous rail, such as is manufactured by J. T. Winslow, of Troy, and to maintain and keep the same in repair when so relaid. The said Corning and Blossburg Railroad Company to furnish free of charge to the said defendants suitable grounds in the village of Corning for the necessary depots, machine-shops, and engine-houses, with sufficient grounds at or near the depot of the New

York and Erie Railroad, and also upon the river-front at some convenient point, and necessary facilities for the business of the railroad of the said companies, not including the coal and lumber business of the Tioga Railroad Company, and also free of charge to each, to maintain and repair the necessary depots, machine-shops, and engine-houses, at suitable and proper places upon the ground so to be furnished, and also to erect, maintain, and keep in order the necessary water stations and apparatus at suitable points between Corning and the State-line. And in and by said agreement, it was further understood and agreed that the
33 principal repairs of engines, cars, &c., should be made at the machine-shops, &c., to be erected at the village of Corning. And in and by the said agreement, the said defendants agreed on their part to use all due diligence to have the track of their railroad from Blossburg to the State-line relaid with heavy iron rails, of the description of one of the kinds above specified, and to maintain and keep the same in repair when so relaid. And in and by the said agreement the defendants also agreed that when the track of the said railroad shall be completely relaid, and the depots, machine-shops, and engine-houses, water-stations and apparatus, built and ready for use, as above provided, they would purchase from the owners of the same the locomotives, machinery, and cars then in use on the railroad of the said companies, at a cash valuation to be made by disinterested persons, each party choosing one, and in case such persons could not agree, they to be at liberty to choose a third, and to pay for the same in the preferred certificates of loan of the defendants, bearing seven per cent. interest. And in and by the said agreement the said defendants further agreed that when the said railroad should be relaid and ready for use as aforesaid, they, the said defendants, would operate the same from Corning to Blossburg, for the purpose of transporting passengers, mails, coal, lumber, merchandise, and such other freights as should be furnished for transportation upon the said railroad, and for that purpose should furnish and provide, maintain, and keep in repair, the necessary motive-power, engines, machinery, and cars, (nevertheless they, the defendants, should not be bound to furnish coal-cars,) for all the regular business that should be furnished to said railroad. And in and by the said agreement it was further agreed that uniform rates of tolls and charges for the transportation of passengers, mails, and freights on and upon the said rail-
34 road, should be established annually by the mutual agreement of the said companies, and in case of disagreement between them, such rates of toll and charges should be settled by disinterested persons, each party choosing one, and in case such persons could not agree, they to be at liberty to choose a third; and for the use of the said railroad of the said Corning and Blossburg Railroad Company, and the use of their depots, engine-houses, machine-shops, grounds, water-stations, &c., the said defendants agreed to pay to the Corning and Blossburg Railroad Company two-thirds of the receipts for passengers, mails, and freights, which shall be taken for the said Corning and Blossburg Railroad, the expenses charged customers for the loading and unloading of coal, lumber, and other freights, and for warehousing and such additional charges by way of discrimination as should be made for short distances for motive-power, not to be included in the term receipts as above mentioned, payments for all cash business to be made at the expiration of each and every month from the commencement of the said agreement, and of all amounts, within thirty days after the expiration of each and every month as aforesaid, and the said defendants were to furnish to the said Corning and Blossburg Railroad Company way-bills of all the passen-

gers, freights, &c., passing over the said road during each and every month, at the expiration thereof. And it was further understood and agreed in and by said agreement that the said arrangement for running and operating the said railroad should continue for ten years after the said railroad should be relaid and ready for use. And the said plaintiffs further say that afterwards, to wit, on the 23d day of October, 1852, at Corning aforesaid, a certain other agreement in writing was made by and between the said Corning and Blossburgh Railroad Company and the said defendant, in and by which it was recited, in substance and
35 effect, that on the 29th day of July, 1851, the said parties had made and entered into the said above-mentioned and recited agreement, and that differences had arisen in relation to the same, and that the said parties thereto had agreed to modify the same, and the said defendants did, in and by the said last-mentioned agreement, agree to take the railroad of the said Corning and Blossburgh Railroad Company in its then present condition, to slope, surface, ditch, complete, and finish the same, and do everything necessary to fit the same for use, and according to the terms and conditions of the said first-mentioned contract, and the said defendants in and by said last-mentioned agreement, further agreed to put in a proper and fit condition for use, all the water-stations on the railroad of the said Corning and Blossburgh Railroad Company, west of Corning. And in and by the said last-mentioned contract, the said defendants did further agree that after the iron should be laid upon the same, the said defendants would slope, surface, ditch, and finish, in a proper and suitable manner, the turnouts and branches of the said Corning and Blossburgh Railroad, on the line of the same, and at the village of Corning, and the said Corning and Blossburgh Railroad Company did, in and by the said last-mentioned agreement, agree to construct two turnouts on the line of the said railroad, at such places as the said defendants should direct, but the defendants should pay any additional expense of grading which should be incurred in consequence of any change of present locations. And the said Corning and Blossburgh Railroad Company did further agree to fix and put in proper condition their water-tanks at the village of Corning, and to continue the track of their railroad so as to connect with the branches of the Buffalo, Corning and New York, and the New York and Erie Rail-
36 road, below the village of Corning, and also to complete and finish the depots, machine-shops, and engine-houses, and the necessary tracks to and through the same, with a turn-table, or a Y, for the purpose of turning engines. And the said Corning and Blossburg Railroad Company further agreed to secure the bank on the river-side, at or near the point of the hill above the village of Corning, by sloping and riprapping the said bank, and also the bank at or near Ryers' Eddy by piles, and brush, and stones. And in and by said last mentioned agreement it was further agreed that, in consideration of the completing and finishing of the said railroad of the said Corning and Blossburg Railroad Company, as in the said contract before specified, the said defendants were to receive three hundred dollars per mile, to be reserved out of the first earnings of the Corning and Blossburg railroad, under said contract, and that the length of the said road, for the purpose of determining the said compensation, as well as the compensation for repairs thereinafter specified, was thereby fixed at fifteen miles. And that the said defendants did, in and by said contract, further agree that, when the track and branches of the said Corning and Blossburg Railroad should be completed and finished as therein before stated, to keep and maintain the same in good condition and repair during the contin-

nance of the said contract, in consideration of which the said defendants should receive two hundred and fifty dollars per mile per annum, to be reserved in equal monthly payments out of the earnings of the said Corning and Blossburg railroad during the continuance of the said contract as aforesaid; and the said defendants further agreed to build and maintain on each side of said Corning and Blossburg railroad, all fences which should be necessary, for which the said defendants should receive seventy-five cents per rod for all fences they should so
37 build, to be reserved out of said earnings of the said Corning and Blossburg railroad, which said sum of seventy-five cents per rod was to cover the building and maintaining the said fences during the continuance of the said contract. And the said plaintiffs further say that afterwards, to wit, on the 15th day of January, 1853, at Corning aforesaid, by a certain instrument in writing, duly made and executed by and between the said Corning and Blossburg Railroad Company and the said defendants, and endorsed upon the said last-mentioned contract, the said defendants agreed to secure the bank at or near Ryers' Eddy, by gravel stones, and riprapping, for the sum of twelve hundred dollars, to be paid out of the earnings of the Corning and Blossburg Railroad, as was provided in said contracts for the completion of the Corning and Blossburg railroad, and the said Corning and Blossburg Railroad Company were thereby released from any liability for or on account of said work at Ryers' Eddy. And the said plaintiffs further say that the said Corning and Blossburg Railroad Company, afterwards, to wit, on the first day of October, 1852, at Corning aforesaid, did relay the track of their said railroad, and fully and in all things performed all and singular the agreements and conditions on their part, in and by the said contract first above recited and the several agreements above mentioned modifying the same, to be performed, and the said defendants afterwards, to wit, on the day and year, and at the place aforesaid, took possession of, accepted and received, the said railroad of the said Corning and Blossburg Railroad Company, with the depots, machine-shops, engine-houses, and grounds, under and in pursuance of the terms and provisions of the said contracts or agreements, as relaid and ready for use, and, from the time last aforesaid,
38 the said defendants occupied and operated, and continued to occupy and operate the same, for the full end and term of ten years thereafter.

And the said plaintiffs further say that heretofore, to wit, on the 22d day of March, 1854, at Corning aforesaid, in and by a certain instrument in writing, duly made and executed by the said Corning and Blossburg Railroad Company, under their corporate seal, it was amongst other things recited that the said Corning and Blossburg Railroad Company had, on the 23d day of November, 1853, duly assigned to John Magee the said contract or lease hereinbefore recited, as collateral security for the payment of certain money due from the said Corning and Blossburg Railroad Company to said Magee, and that the land and premises on which the road-track of the said company was located, with the road-fixtures and appurtenances thereon, and thereto belonging, were, on the 31st day of December, 1852, sold by the sheriff of the county of Steuben, by virtue of a judgment and execution against the said company, and at such sale, were bid off by John Magee, and the time during which the said company had the right to redeem the same from said sale, as judgment-debtors, had expired, and the same had not been redeemed by said company, and, therefore, in consideration of the premises therein contained, and of an agreement, on the day last

aforesaid executed by said Magee, to carry out and perform the said contracts and lease on the part of said Corning and Blossburg Railroad Company, and to secure the running and operating of the said railroad of the said company, and in good faith, as far as might be, to place the said John Magee in a situation where he might fully carry out and perform the said contract and lease, so far as the performance depended upon the Corning and Blossburg Railroad Company, and thus to secure to the defendants all the rights, benefits, and privileges to which they might be entitled under the
39 said contracts, the said Corning and Blossburg Railroad Company did thereby sell, assign, transfer, and set over to the said John Magee (subject to the assignment so as aforesaid made by Corning and Blossburg Company to said John Magee) the said several contracts with the defendants, and all the right and interest which the said Corning and Blossburg Railroad Company had in the same, so far as related to the running and operating the said railroad. And the said plaintiffs further say that heretofore, to wit, on the 13th day of June, 1854, at Corning aforesaid, by a certain instrument in writing, duly made and executed under the hand and seal of the said John Magee, it was, amongst other things, recited that, by a certain agreement made on the 29th day of July, 1851, between the Corning and Blossburg Railroad Company and the defendants, and a further agreement modifying the same, made between the same parties on the 23d day of October, 1852, the said defendants, amongst other things, agreed to stock and run the railroad of the Corning and Blossburg Railroad Company in connection with the Tioga Railroad, for the term of ten years, and that said contracts were, on the 22d day of March, 1854, duly assigned by the said Corning and Blossburg Railroad Company to the said John Magee, and that the said plaintiffs had become by purchase the owners of the railroad, theretofore owned by the Corning and Blossburg Railroad Company, the John Magee did, in and by the said instrument in writing, in consideration of the premises therein recited, and of the sum of ten dollars, to him in hand paid by the plaintiffs, sell, assign, transfer, and set over to the said plaintiffs all his right, title, and interest of, in, and to the said therein above-recited contracts with the said defendants; and it was, in and by said last-mentioned instrument in writing, provided that nothing therein contained should be so construed as to entitle the said
40 plaintiffs to all or any portion of the money which had accrued and become payable, under and by virtue of said contracts, on or before the first day of June, 1854, but the same, and the right to collect the same as might be necessary, were expressly saved and reserved for the effect of the said instrument in writing.

And the said plaintiffs further say that heretofore, to wit, on the 29th day of November, 1852, at Corning aforesaid, the said Corning and Blossburg Railroad Company, by their certain indenture of mortgage, bearing date on that day, did grant, bargain, sell, assign, and set over to the said John Magee, his heirs and assigns, amongst other things, all and singular the said Corning and Blossburg Railroad of the said Corning and Blossburg Railroad Company, situate in the County of Steuben and State of New York, and extending from the village of Corning in said county, to the Pennsylvania State line, together with the land, track, lines, rails, bridges, ways, buildings, erections, fences, walls, fixtures, privileges, franchises, and real estate, whatever then owned by the said Corning and Blossburg Railroad Company. And in and by the said indenture of mortgage it was declared the same was intended as a mortgage to secure the payment of the sum of twenty-five thousand

dollars, payable one-half in twelve months and one-half in twenty-four months from the first day of January, 1853, with interest at the rate of seven per cent., payable semi-annually, according to the conditions of a certain bond, bearing even date with the said mortgage, executed by the said Corning and Blossburg Railroad Company to the said John Magee, and which payments, if duly made, would render the said indenture void. But in case default should be made in the payment of the principal and interest, it was provided in said indenture that then and from thenceforth it should be lawful for the said John Magee,
41 amongst other things, to sell and dispose of said premises, and all benefit and equity of redemption of the said Corning and Blossburg Railroad Company, at public auction, according to the statute in such case made and provided, and as the attorney of the said Corning and Blossburg Railroad Company for that purpose, by the said indenture duly constituted, to make and deliver to the purchaser or purchasers good and sufficient deed or deeds of conveyance of the same in fee simple, which sale should be a perpetual bar against the said Corning and Blossburg Railroad Company, and all persons claiming by, from, or under them or either of them. And the said plaintiffs further say that afterwards, to wit, on the 13th day of April, 1855, at Corning, aforesaid, the said Corning and Blossburg Railroad Company failed and made default in the payment of the said sum of money in the said bond and mortgage mentioned, and on the day last aforesaid, there remained due and unpaid of the said money a large sum, to wit, the sum of $16,319.89, and thereupon the said John Magee, on the day last aforesaid, caused and procured to be published in the Corning Journal, a newspaper published at Corning, Steuben County, a notice, pursuant to the statute of the State of New York in such case made and provided, that the said mortgaged property would be sold at public auction at the Dickinson House, in the village of Corning aforesaid, on the seventh day of July, 1855, at two o'clock in the afternoon, which said notice was duly published, served, and posted, pursuant to the provisions of the statute aforesaid. And the said plaintiffs further say that afterwards, and on the day and at the place specified in the said notice of the sale thereof, the said mortgaged property was duly sold at public auction, and on such sale was struck off and sold to the plaintiffs for the sum of sixteen thousand six hundred and thirteen $\frac{47}{100}$ dollars, that being the
42 highest sum bid therefor, and the plaintiffs being the bidder.

And the said plaintiffs further say that afterwards, to wit, on the seventh day of July, 1855, at Corning aforesaid, affidavits of the due publication of the said notice of sale, of the posting and service thereof, and of the fact of such sale, were duly made, and the same were afterwards, to wit, on the ninth day of July, 1855, at Bath in said county, duly recorded at length in the book kept for the record of mortgages in the office of the clerk of the County of Steuben, pursuant to the provisions of the statute aforesaid, by means whereof, and by force of the statute of the State of New York in such case made and provided, the said plaintiffs became and were, and still are, seized in fee of the said railroad of the said Corning and Blossburg Railroad Company, and all the other property mentioned and described in the said indenture of mortgage, being the same identical property mentioned and described in the said contracts so made between the Corning and Blossburg Railroad Company and the defendants, as aforesaid; of all which several premises the said defendants afterwards, to wit, on the day and year and at the place aforesaid, had notice.

And the said plaintiffs further say that the said defendants, to wit,

at Corning aforesaid, have received for passengers, mails, and freights which were taken for the said Corning and Blossburg Railroad, between the first day of October, 1852, and the first day of June, 1854, a large amount of money, to wit, the sum of one hundred and fifty thousand dollars over and above the several sums which the said defendants, under and in pursuance of the said contracts, were entitled to reserve from the earnings of the said railroads, including the amount which the said defendants were up to that time entitled to reserve monthly for repairs, as provided in and by the terms of said contract, and of all sums which the said defendants have up to that time paid to the said
43 Corning and Blossburg Railroad Company or to the said John Magee. And the said plaintiffs further say that afterwards, to wit, on the fourth day of May, 1864, at Corning, in the county of Steuben, the said John Magee, by a certain instrument in writing, then and there duly made and executed under his hand and seal, it was recited that in and by a certain instrument bearing date the 13th day of June, 1854, the said John Magee did sell, assign, and transfer to the plaintiffs all his right, title, and interest in and to certain contracts before then made by and between the Corning and Blossburg Railroad Company and the defendants, and that that portion of the moneys due, under and by virtue of said contracts, which had accrued and become payable on or before the first day of June, 1854, was saved and reserved from the effect of the said assignment, and the said John Magee, in and by the said last-mentioned instrument in writing, for value received, did sell, assign, transfer, and set over to the said plaintiffs all his right, title, interest, and claim in and to all and singular the said money which had so become due and payable under and by virtue of the said contracts so assigned, as aforesaid, on or before the said first day of June, 1854, and which in and by the said instrument in writing, of the date of 13th day of June, 1854, were saved and reserved from the effect of such assignment, as fully as the said John Magee had the right to sell or assign the said money, or the claim for the recovery thereof, of all which the said defendants, afterwards, to wit, on the day and year, and at the place aforesaid, had notice. And the said plaintiffs further say that the said defendants, although often requested so to do, have neglected and refused to pay to the said Corning and Blossburg Railroad Company, or to the said John Magee, or the said plaintiffs, and still do neglect and refuse to pay to the said plaintiffs, two-thirds of all
44 of said receipts for passengers, mails, and freights which were taken for the said Corning and Blossburg Railroad during the time aforesaid, at the times and in the manner in the said contracts specified, or in any other manner whatsoever.

And whereas, also, the said plaintiffs are, and at the times hereinafter mentioned were, a corporation duly organized and doing business under the laws of the State of New York, and the said defendants are, and during all the time aforesaid were, a corporation duly organized and doing business under the laws of the State of Pennsylvania. And the said plaintiffs further say, that heretofore, to wit, on the 29th day of July, 1851, at Corning, in the county of Steuben, and State of New York, the Corning and Blossburg Railroad Company was a corporation duly organized and doing business at Corning, aforesaid, under the laws of the State of New York, and, as such, were the owners of, and lawfully seized and possessed of a certain railroad, with the franchises and appurtenances thereunto belonging, and being so seized and possessed thereof, heretofore, to wit, on the day and year, and at the place aforesaid, by a certain lease, instrument, or agreement in writing, then and

there duly made and executed between the said Corning and Blossburg Railroad Company of the one part, and the said defendants of the other part, it was, amongst other things, agreed, in substance and effect, as follows, viz: The said Corning and Blossburg Railroad Company agreed to use all due exertion to have the track of their railroad relaid with heavy iron rails, similar to those in use on the New York and Erie Railroad, or the pattern called the continuous rail, such as is manufactured by J. T. Winslow, of Troy, and to maintain and keep the same in repair, when so relaid; the said Corning and Blossburg Railroad Com-
45 pany to furnish, free of charge, to the said defendants, suitable grounds in the village of Corning, for the necessary depots, machine-shops, and engine-houses, with sufficient grounds at or near the depot of the New York and Erie Railroad, and also upon the river front at some convenient point, and necessary facilities for the business of the railroad of the said companies, not including the coal and lumber business of the Tioga Railroad Company, and also, free of charge, to each maintain and repair the necessary depots, machine-shops, and engine-houses, at suitable and proper places upon the grounds so to be furnished, and also to erect, maintain, and keep in order the necessary water-stations and apparatus, at suitable points between Corning and the State line. And in and by said agreement it was further understood and agreed that the principal repairs of engines, cars, &c., should be made at the machine-shops, &c., to be erected at the village of Corning. And in and by said agreement the said defendants agreed, on their part, to use all due diligence to have the track of their railroad from Blossburg to the State-line relaid with heavy iron rails, of the description of one of the kinds above specified, and to maintain and keep the same in repair, when so relaid. And in and by the said agreement, the said defendants also agreed that when the track of the said railroad should be completely relaid, and the depots, machine-shops and engine-houses, water-stations and apparatus built and ready for use, as above provided, they would purchase from the owners of the same the locomotives, machinery, and cars then in use on the railroad of the said companies, at a cash valuation, to be made by disinterested persons, each party choosing one, and in case such persons could not agree, they to be at liberty to choose a third, and to pay for the same in the preferred certificates of loan of the defendants, bearing seven per cent. interest. And in and
46 by the said agreement, the said defendants further agreed that when the said railroad should be relaid and ready for use, as aforesaid, they, the said defendants, would operate the same from Corning to Blossburg, for the purpose of transporting passengers, mails, coal, lumber and merchandise, and such other freights as should be furnished for transportation upon the said railroad, and for that purpose should furnish and provide, maintain, and keep in repair the necessary motive-power, engines, machinery, and cars (nevertheless, they, the defendants, should not be bound to furnish coal-cars) for all the regular business that should be furnished to said railroad. And in and by the said agreement it was further agreed that uniform rates of tolls and charges for transportation of passengers, mails, and freights on and upon the said railroad shall be established annually by the mutual agreement of the said companies, and in case of disagreement between them, such rates of toll and charges should be settled by disinterested persons, each party choosing one, and in case such persons could not agree, they to be at liberty to choose a third, and for the use of the said railroad of the said Corning and Blossburg Railroad Company, and the use of their depots, engine-houses, machine-shops, grounds, water-stations, &c., the said de-

fendants agreed to pay to the Corning and Blossburg Railroad Company two-thirds of the receipts for passengers, mails, and freights, which shall be taken for the said Corning and Blossburg Railroad, the expenses charged customers for the loading and unloading coal, lumber, and other freights and for warehousing, and such additional charges, by way of discrimination, as should be made for short distances for motive-power, not to be included in the term receipts, as above mentioned, payments for all cash business to be made at the expiration of each and every month from the commencement of said agreement, and of all amounts within
47 thirty days from the expiration of each and every month, as aforesaid, and the said defendants were to furnish to the said Corning and Blossburg Railroad Company way-bills of all the passengers, freights, &c., passing over the said road during each and every month, at the expiration thereof. And it was further understood and agreed in and by said agreement that the said arrangement for running and operating the said railroad should continue for ten years after the said railroad should be relaid and ready for use. And the said plaintiffs further say that afterwards, to wit, on the 23d day of October, 1852, at Corning aforesaid, a certain other agreement in writing was made by and between the said Corning and Blossburg Railroad Company and the said defendants, in and by which it was recited, in substance and effect, that on the 29th day of July, 1851, the said parties had made and entered into the said above mentioned and recited agreement, and that differences had arisen in relation to the same, and that the said parties thereto had agreed to modify the same, and the said defendants did, in and by the said last-mentioned agreement, agree to take the railroad of the said Corning and Blossburg Railroad Company in its then present condition, to slope, surface, ditch, complete, and finish the same, and do everything necessary to fit the same for use, and according to the terms and conditions of the said first-mentioned contract, and the said defendants, in and by said last-mentioned agreement, further agreed to put in a proper and fit condition for use all the water-stations on the railroad of the said Corning and Blossburg Railroad Company west of Corning. And in and by the said last-mentioned contract, the said defendants did further agree that, after the iron should be laid upon the same, the said defendants would slope, surface, ditch, and finish in a proper and
48 suitable manner the turn-outs and branches of the said Corning and Blossburg Railroad, on the line of the same, and at the village of Corning, and the said Corning and Blossburg Railroad Company did, in and by the said last-mentioned agreement, agree to construct two turn-outs on the line of said railroad at such places as the said defendants should direct, but the said defendants should pay any additional expense of grading which shall be incurred in consequence of any change of present locations. And the said Corning and Blossburg Railroad Company did further agree to fix and put in proper condition their water-tanks in the village of Corning, and to continue the track of their railroad so as to connect with the branches of the Buffalo, Corning and New York, and the New York and Erie Railroads, below the village of Corning, and also to finish and complete the depots, machine-shops, and engine-houses, and the necessary tracks to and through the same, with a turn-table or a Y, for the purpose of turning engines, and the said Corning and Blossburg Railroad Company further agreed to secure the bank on the river side at or near the point of the hill above the village of Corning, by sloping and riprapping the said bank, and also the bank at or near Ryers' Eddy, by piles, and brush, and stones. And in and by said last-mentioned agreement it was further agreed that, in consid-

eration of the finishing and completing of the said railroad of the said Corning and Blossburg Railroad Company, as in the said contract before specified, the said defendants were to receive three hundred dollars per mile, to be reserved out of the first earnings of the Corning and Blossburg Railroad, under said contract. And that the length of the said road for the purpose of determining the said compensation, as well as the compensation for repairs, thereinaftor specified, was thereby
49 fixed at fifteen miles. And the said defendants did, in and by said contract further agree that, when the track and branches of the said Corning and Blossburg Railroad should be completed and finished, as thereinbefore specified, to keep and maintain the same in good condition and repair during the continuance of the said contract, in consideration of which the said defendants should receive two hundred and fifty dollars per mile per annum, to be reserved, in equal monthly payments, out of the earnings of the said Corning and Blossburg Railroad during the continuance of the said contract, as aforesaid, and the said defendants further agree to build and maintain on each side of the said Corning and Blossburg Railroad all fences which should be necessary, for which the said defendants should receive seventy-five cents per rod for all fences they should so build, to be reserved out of said earnings of the said Corning and Blossburg Railroad, which said sum of seventy-five cents per rod was to cover the building and maintaining the said fences during the continuance of the said contract. And the said plaintiffs further say that afterwards, to wit, on the 15th day of January, 1853, at Corning, aforesaid, by a certain instrument in writing, duly made and executed by and between the said Corning and Blossburg Railroad Company and the said defendants, and endorsed upon the last-mentioned contract, the said defendants agreed to secure the bank at or near Ryers' Eddy, by gravel, stones, and riprapping, for the sum of twelve hundred dollars, to be paid out of the earnings of the Corning and Blossburg Railroad, as was provided in said contract for the completion of the Corning and Blossburg Railroad, and the said Corning and Blossburg Railroad Company were thereby released from any liability for or on account of the said work at Ryers' Eddy. And the said plaintiffs further say that the said Corning and Bloss-
50 burg Railroad Company, afterwards, to wit, on the first day of October, 1852, at Corning aforesaid, did relay the track of their said railroad, and fully, and in all things performed all and singular the agreements and conditions on their part, in and by the said contract first above recited and the several agreements above mentioned modifying the same, to be performed, and the said defendants, afterwards, to wit, on the day and year and at the place aforesaid, took possession of, accepted, and received the said railroad of the said Corning and Blossburg Railroad Company, with the depots, engine-houses, machine-shops, and grounds, under, and in pursuance of the terms and provisions of the said contracts or agreements, as relaid and ready for use, and from the time last aforesaid, the said defendants occupied and operated, and continued to occupy and operate, the same, for the full end and term of ten years thereafter. And the said plaintiffs further say, that heretofore, to wit, on the 22d day of March, 1854, at Corning aforesaid, the said Corning and Blossburg Railroad Company, in and by a certain instrument in writing, duly made and executed under their corporate seal, did, amongst other things, thereby sell, assign, transfer, and set over to John Magee the said several contracts with the said defendants, and all the right and interest which the said Corning and Blossburg Railroad Company had in the same, so far as related to the

running and operating the said railroad, and the said Corning and Blossburg Railroad Company did, in and by the said last-mentioned instrument in writing, constitute and appoint the said John Magee their true and lawful attorney irrevocable, to demand, receive, and collect all moneys due and to grow due upon the said contracts, and to enforce the said contracts by all lawful ways and means. And the said plaintiffs further say that heretofore, to wit, on the 13th day of June, 1854, at Corning
51 aforesaid, the said John Magee, in and by a certain instrument in writing, by him duly made and executed under his hand and seal, in consideration of the premises therein recited, and of the sum of ten dollars, to him in hand paid by the plaintiffs, did sell, assign, transfer, and set over to the said plaintiffs all his right, title, and interest of, in, and to the said above mentioned and recited contracts with the said defendants; and it was in and by the said last-mentioned instrument in writing provided that nothing therein contained should be so construed as to entitle the said plaintiffs to all or any portion of the money which had accrued and become payable under and by virtue of said contracts on or before the first day of June, 1854; but the same and the right to collect the same, as might be necessary, were expressly saved and reserved from the effect of the said instrument in writing; of all which said several premises the said defendants afterwards, to wit, on the day and year and at the place aforesaid, had notice. And the said plaintiffs further say that the said defendants, to wit, at Cornning aforesaid, have received for passengers, mails, and freights, which were taken for the said Corning and Blossburg Railroad, between the first day of October, 1852, and the first day of June, 1854, a large amount of money, to wit, the sum of one hundred and fifty thousand dollars over and above the several sums which the said defendants, under and in pursuance of the said contracts, were entitled to reserve from the earnings of the said railroad, including the amounts which the said defendants were, up to that time, entitled to reserve monthly for repairs, as provided in and by the terms of said contracts, and over and above all sums which the said defendants had up to that time paid to the said Corning and Blossburg Railroad Company or to the said John Magee. And the said plaintiffs further say that
52 afterwards, to wit, on the 4th day of May, 1864, at Corning, in the county of Steuben, in and by a certain instrument in writing, duly made and executed under the hand and seal of the said John Magee, it was recited that, in and by a certain instrument in writing, bearing date the 13th day of June, 1854, the said John Magee did sell, assign, and transfer to the plaintiffs all his right, title, and interest in and to certain contracts before then made by and between the Corning and Blossburg Railroad Company and the defendants, and that that portion of the moneys due under and by virtue of said contracts, which had accrued and become payable on or before the first day of June, 1854, was saved and reserved from the effect of the said assignment, and the said John Magee, in and by the said last-mentioned instrument in writing, for value received, did sell, assign, transfer, and set over to the said plaintiffs all his right, title, interest, and claim in and to all and singular the said money which had so become due and payable under and by virtue of the said contracts so assigned as aforesaid, on or before the said first day of June, 1854, and which, in and by the said instrument in writing, of date of 13th day of June, 1854, were saved and reserved from the effect of such assignment, as fully as the said John Magee had the right to sell and assign the said moneys or the claim for the recovery thereof, of all which the said defendants

afterwards, to wit, on the day and at the place aforesaid, had notice. And the said plaintiffs further say that the said defendants, although often requested so to do, have neglected and refused to pay to the said Corning and Blossburg Railroad Company or to the said John Magee, or the said plaintiffs, and still do neglect and refuse to pay to the said plaintiffs, two-thirds of all of said receipts for passengers, mails, and freights which were taken for the said Corning and Blossburg
53 Railroad during the time aforesaid, at the times and in the manner in said contracts specified, or in any other manner whatever, to the damage of the said plaintiffs of one hundred and fifty thousand dollars, and therefore the said plaintiffs bring suit, &c.

D. RUMSEY,
Plaintiffs' Attorney.

In circuit court of United States for the northern district of New York.

THE TIOGA RAILROAD COMPANY
against
THE BLOSSBURG & CORNING RAILROAD COMPANY.

Pleas, &c.

And now, at this day, that is to say, on the third Tuesday of June, in this same term, until which day the said defendant had leave to imparl to the said declaration and then to answer the same before the judges of the said court at Canandaigua aforesaid, comes as well the said plaintiff, by its attorney aforesaid, as the said defendant, by Hamilton Harris, its attorney; and the said defendant, by Hamilton Harris, its attorney, comes to defend the wrong and injury to which, &c., and says that it did not undertake and promise in manner and form as the said plaintiff hath above thereof complained against it, and of this the said defendant puts itself upon the country, and the said plaintiff doth the like, &c.

And, for a further plea in this behalf, and by leave of the court for that purpose first had and obtained, according to the form of the statute made, the said defendant says that the said plaintiff ought not to have or maintain the action aforesaid against this defendant, because the said defendant says that after the making the contract aforesaid and the several promises and undertakings in the said amended declaration aforesaid set forth, the said defendant fully paid and satisfied the said plaintiff, all and singular the said several sums of money in the said amended declaration specified and set forth, and this the said defendant is ready to verify. Wherefore the said defendant prays
54 judgment if the said plaintiff ought to have or maintain the action aforesaid against the said defendant, &c.

And, for a further plea in this behalf, by leave of the court for that purpose here first had and obtained, according to the form of the statute in that case made, the said defendant says that the said plaintiff ought not to have or maintain the action aforesaid against this defendant, because this defendant says that the said several causes of action, and each and every one of them in the said amended declaration set forth, did not, nor did any part thereof, accrue to the said plaintiff at any time within six years next before the commencement of this suit, in manner and form as the said plaintiff hath, in declaring above, alleged, and this the said defendant is ready to verify. Wherefore the said defendant prays

judgment if the said plaintiff ought to have or maintain the action aforesaid thereof against the said defendant, &c.

And, for a further plea in this behalf, by leave of the court first had and obtained, according to the form of the statute in that case made and provided, the said defendant says that the plaintiff ought not to have or maintain the aforesaid action against this defendant, because this defendant says that as to so much and such part of the claim and demand of the plaintiff as in the 4th and 5th counts in said amended declaration alleged to have accrued prior to the 1st day of June, 1854, the said defendant, heretofore, to wit, on the 1st day of June, 1854, accounted with the said Corning and Blossburg Railroad Company for all moneys theretofore due to the said Corning and Blossburg Railroad Company under the said several agreements, and then and there fully paid and satisfied the said Corning and Blossburg Company for the same. And as to the claims and demands of the said plaintiffs, as in the 4th and 5th counts in said amended declaration mentioned, sup-
55 posed to have accrued since the said first day of June, 1854, the said defendant says that it afterwards, to wit, on the 1st day of September, 1864, fully paid and satisfied the same and each and every part thereof, and this the said defendant is ready to verify. Wherefore the said defendant prays judgment if the said plaintiff ought to have or maintain the aforesaid action against the said defendant, &c.

In the circuit court of the United States for the northern district of New York.

THE TIOGA RAILROAD COMPANY
against
THE BLOSSBURG & CORNING RAILROAD COMPANY.

And for a further plea in this behalf (as amended) by leave of the court first had and obtained according to the form of the statute in such case made and provided, the said defendant says that the said plaintiff in respect to the 4th and 5th counts in the said amended declaration ought not to have or maintain the aforesaid action against this defendant in respect to the claim and demand in said accounts stated, because the defendant says that on or about the 14th of February, 1855, the said plaintiff commenced an action in the supreme court of the State of New York, to recover a part of the same identical moneys as is stated and claimed in the said 4th and 5th counts of the said amended declaration, and such proceedings were thereupon had in the said court that afterwards, to wit, on the 16th day of September, 1857, the said plaintiff by the consideration and judgment of the said court recovered against this defendant the sum of $5,854.54, damages and $251.69 costs and
56 charges in that behalf expended, as by the record and proceedings thereof still remaining in said court more fully and at large appears, and which said judgment the said defendant has paid and satisfied, by reason whereof all of the claims and demands of the said plaintiff mentioned in the said 4th and 5th counts of the said amended declaration were fully paid, released, and discharged. And all this the defendant is ready to verify. Wherefore the said defendant prays judgment, if in respect to the said 4th and 5th counts of said amended declaration the said plaintiff ought to have or maintain the aforesaid action against the said defendant.

HAMILTON HARRIS,
Defendant's Attorney.

SIR: Please to take notice that on the trial of this cause under the general issue above pleaded, the defendant will give evidence to show that the additional charges by way of discrimination, made for short distances, for or on account of motive-power, mentioned in the contract or agreement referred to in the declaration in this cause, were annually, by the consent and agreement of the parties embraced and included in the tariff of rates for freight and passengers, under which the said defendant managed and operated the railroad aforesaid for the time and terms mentioned in the aforesaid lease or agreement, and that no other discrimination' on account of motive-power for short distances were ever made or intended to be made by the defendant under the provisions of said contract, except such as, by the mutual agreement and consent of both parties were embraced and included in the tariff of rates for freight and passengers, under which the said railroad was operated by the said defendant during the term aforesaid, and that the said defendant has not at any time during the term aforesaid, retained any other or greater
57 amount of the receipts of the said railroad, on account of the discriminations aforesaid, than arose from the said discriminations embraced in the said freight and passenger tariff, by the agreement of the parties aforesaid.

And the defendant will further give evidence to show that it has in all things performed and complied with all the provisions of the said contract on its part to be kept and performed.

Dated, August 6th, 1869.

Yours, &c.,

HAMILTON HARRIS,
Defendant's Attorney.

To D. RUMSEY, Esq.,
Plaintiff's Attorney.

In the circuit court of United States for the northern district of New York.

THE BLOSSBURGH & CORNING RAILROAD COMPANY
against
THE TIOGA RAILROAD COMPANY.

Replications.

First. And the said plaintiff as the said plea of the defendant, by it secondly above pleaded, says that the said plaintiff, by reason of anything in that plea alleged ought not to be barred from having and maintaining its aforesaid action thereof against the said defendant, because it says that the defendant did not, after the making of the contract aforesaid, and the several promises and undertakings, in the plaintiff's declaration set forth, fully pay and satisfy the said plaintiff all and
58 singular the said several sums of money in the said declaration specified and set forth; and of this the said plaintiff puts itself upon the country. And the said defendant doth the like, &c.

Second. And the said plaintiff as to the said plea of the said defendant, by it thirdly above pleaded, says that the said plaintiff by reason of anything by the said defendant in that plea alleged, ought not to be barred from having and maintaining its aforesaid action thereof against the said defendant, because it says that the said several causes of action, and each and every of them, in said declaration set forth, did, and each

of them and every part thereof did, accrue to the said plaintiff within six years next before the commence of this suit, in manner and form as the said plaintiff hath above complained against the said defendant; and of this the said plaintiff puts itself upon the country. And the said defendant doth the like, &c.

Third. And for a further replication to the said plea of the said defendant by it thirdly above pleaded, the said plaintiff, by special leave of the court, for that purpose first had and obtained, says that the said plaintiff, by reason of anything by the said defendant in that plea alleged, ought not to be barred from having and maintaining its aforesaid action thereof against the said defendant, because it says that the said defendant was and is a body-corporate, created and existing under and by virtue of the laws of the State of Pennsylvania, and that it is not and was not a corporation created or existing under or by virtue of any law or laws of the State of New York, and that at the time the said several causes of action in the plaintiff's declaration mentioned accrued to the plaintiff, the said defendant was out of the State of New York, and hath ever since, until the time of the commencement of this action, remained out of the State of New York; and this the said plaintiff is ready
59 to verify, wherefore the said plaintiff prays judgment and its damages by it sustained on occasion of the non-performance of the several promises and undertakings in the said declaration mentioned to be adjudged to it, &c.

Fourth. And the said plaintiff, as to the said plea of the said defendant, by it fourthly above pleaded, says that the said plaintiff, by reason of anything in that plea alleged, ought to be barred from having and maintaining its aforesaid action thereof against the said defendant, because it says that the said defendant did not, on the said first day of June, 1854, or at any other time, fully pay and satisfy the said several sums of money, claims, and demands in the said fourth and fifth counts of the said declaration mentioned, or any or either of them, or any part thereof in manner and form as the said defendant hath in its said fourth plea in that behalf alleged, and of this the said plaintiff puts itself upon the country. And the said defendant doth the like, &c.

In the circuit court of the United States for the northern district of New York.

THE BLOSSBURG AND CORNING RAILROAD COMPANY
against
THE TIOGA RAILROAD COMPANY.

And the said plaintiff, as to the said plea of the said defendant by it fifthly above pleaded, says that the said plaintiff, by reason of anything by the said defendant in that plea alleged, ought not to be barred from having and maintaining its aforesaid action thereof against the said defendant, because it says that it did not commence an action in this supreme court of the State of New York to recover a part of the same identical moneys as is stated and claimed in the said fourth
60 and fifth counts of the said amended declaration, and that the said moneys in the said fourth and fifth counts of the said amended declaration mentioned and claimed, were not, nor was any or either of them, or any part thereof the same identical money as that or any of that in the said plea mentioned, and for and in respect whereof the said supposed judgment in the said fifth plea mentioned, was reserved in manner and form as the said defendant has in its said fifth

plea alleged, and this the said plaintiff prays may be inquired of by the country. And the said defendant doth the like. &c.

D. RUMSEY,
Plaintiff's Attorney.

In circuit court of the United States for the northern district of New York.

THE TIOGA RAILROAD COMPANY
vs.
THE BLOSSBURG AND CORNING RAILROAD COMPANY.

Rejoinder.

And the said defendants, as to the second replication of the said plaintiffs, to the third plea of the said defendants, by them above pleaded, say that the said plaintiffs ought not, by reason of anything in the said second replication by them alleged, to have or maintain their action aforesaid against the said defendants; because they say that when the several causes of action in the declaration mentioned, accrued to plaintiffs against the said defendants, they, the said defendants, were not out of the State of New York, and have not, ever since, until the commencement of this action, remained out of the State of New York, in manner and form, as the said plaintiffs in their said replication have alleged; and of this the said defendants put themselves upon the country.

61 And hereupon the process thereof is continued between the parties aforesaid of the plea aforesaid, in this same court. before the judges thereof, to the term of this court appointed to be held at Canandaigua, in the county of Ontario, on the third Tuesday of June, one thousand eight hundred and sixty-eight, at which said day, at the place last aforesaid, came the parties aforesaid by their attorneys aforesaid.

And hereupon the said court is informed and understands that the trial of the issues aforesaid in this action will require the examination of long accounts on the part of the said plaintiff and defendant.

Whereupon the said court, before the judges thereof, made and entered an order in said action in the words following, viz:

THE BLOSSBURG & CORNING RAILROAD COMPANY
vs.
THE TIOGA RAILROAD COMPANY.

This cause having been regularly reached in it' order on the calendar, and the court being advised that the trial of the same will in-
63,64 volve the examination of a long account, thereupon refused to hear the same, and advised and directed a reference thereof. Whereupon it was in open court consented and agreed by the parties that the same be referred to the referee hereinafter named, and a stipulation was made by the parties accordingly. Now, on reading and filing such stipulation, and pursuant thereto, and to the direction of the court, it is ordered that this cause be and the same is hereby, with all the issues of fact therein, referred to the Hon. Sanford E. Church, of Albion, N. Y., to hear and determine the same and make report therein; that the hearing, determination, and report, which may be had before and made by said referee, be of the same force and effect for all purposes as

if had before and decision made by this court; that judgment be entered thereon according to the course and practice of the court, and that either party have the right to except to the ruling of the referee and to the report which he shall make in the premises, with full right to review the same or the judgment entered thereon.

65,66 And let the said referee report thereon to the court before the judges thereof, at the city hall in the city of Albany, on the second Tuesday of October, one thousand eight hundred and sixty-eight. The same day is given to the parties, at the same place.

At which said day, before the judges aforesaid, at the city hall, in the city of Albany, came the parties aforesaid by their attorneys aforesaid, and the referee aforesaid hath not made his report of the matters aforesaid in controversy, above referred to him, nor hath he done anything thereupon.

And thereupon a further day is given to the referee aforesaid, before the judges aforesaid, at the city of Utica, on the third Tuesday of March, one thousand eight hundred and seventy-one, to report in and upon the matters in controversy referred to him as aforesaid. The same day is given to the parties aforesaid, at the same place.

At which day, before the judges aforesaid, at the city of Utica, come the parties aforesaid, by their attorneys aforesaid, and the said referee, to wit, Sanford E. Church, to whom it was referred, to hear and examine the matters aforesaid in controversy between the parties, and to

67 report thereon, now sends here to the said court, before the judges thereof, his report of the matters aforesaid, in words and figures following, viz:

In the U. S. circuit court, northern dist. of New York.

THE BLOSSBURG & CORNING RAILROAD COMPANY
vs.
THE TIOGA RAILROAD COMPANY.

I, the undersigned, the referee appointed in this cause, having heard the proofs and allegations of the parties, and the arguments of their counsel, & duly considered the same and deliberated thereupon, do certify & report that there is due from the defendant to the plaintiff in this cause, the sum of ninety-four thousand nine hundred and fifty-seven dollars and twenty-seven cents, ($94,957.27.)

Dated March 10, 1871.

S. E. CHURCH,
Referee.

And now, at this same day, at the place aforesaid, the said defendant brings into the said court, before the judges thereof, a certain bill of exceptions, taken at the trial before the said referee, upon the trial

68 of the said action before him, & prays that the same may be entered upon the record of the proceedings in this cause, and it is granted to him &c.; and hereupon the said bill of exceptions is entered upon the said record in the words and figures following, to wit:

69 In the circuit court of the United States for the northern district of New York.

THE BLOSSBURGH AND CORNING RAILROAD Company
against
THE TIOGA RAILROAD COMPANY.

Be it remembered that, at a stated term of the circuit court of the United States for northern district of New York, held at the court-house in the village of Canandaigua, on the 16th day of June, A. D. 1868, before the honorable Nathan K. Hall, district judge for said district, came the parties aforesaid, by their attorneys aforesaid, and thereupon it appearing to the said court that the trial of the issues in this action would involve the examination of a long account, it was thereupon ordered by the said court that this cause be, and the same thereby was, with all the issues of fact therein, referred to the honorable Sanford E. Church, of Albany, N. Y., to hear and determine the same, and make report thereon. That the hearing, determination, and report which may be had before, and made by, the said referee be of the same force and effect for
70 all purposes as if had before and decision made by this court.

That judgment be entered thereon according to the course and practice of the court; and that either party have the right to except to the ruling of the referee and to the report which he shall make in the premises with full right to review the same or the judgment entered thereon, which said order of reference was made with the consent and at the request of all the parties to this action.

And thereupon in pursuance of the said order, afterwards, to wit, on the 24th day of November, 1868, the said cause was regularly brought on for trial before the said referee, at the village of Corning, in the county of Steuben, and, on said trial, the following proceedings were had, to wit:

The counsel for the plaintiff, in order to maintain the said issues on his part, offered in evidence the articles of association of the Corning and Blossburg Railroad Company, recorded 19th May, 1854.

Also, the original contract between the Corning and Blossburgh Railroad Co. and the Tioga Railroad Co., executed 29th July, 1851.

Also, supplemental contract, made 23d October, 1852, between the a ~e parties.

Also, a contract dated 15th January, 1853, between the same parties.

Also, an assignment made by the Corning & Blossburgh Railroad Co. to John Magee, dated 22d day of March, 1854.

Also, a resolution of the board of directors of the Corning & Blossburgh Railroad Company authorizing the last-mentioned assignment to Magee, passed 22d March, 1854.

71 Also, an assignment made by John Magee, dated 13th June, 1854.

Also, the tariff of rates agreed upon under the first contract of July 29th, made on the first of March, 1854, stating the rates for carrying freights and passengers, which was received in evidence, as follows:

Names of the freight-stations on the railroad.	Distance in miles from Corning.	Rates in cents per 1,000 ft B. M. for lumber transported by Tioga R. R. Co.	Rates in cents per 100 lbs. for articles transported by Tioga R. R. Co., in classes, to and from Corning.	
			1st class.	2nd class.
Erwin Centre	8¼	60	8	6
Cook's Turnout	11½	65	9	7
Lindleytown	12½	75	9	7
Lawrenceville	15	85	9	7
Somers' Lane	17½	95	10	8
Mitchell's	20	1 00	11	9
Tioga O. Station	21	1 05	11	9
Berry's Bridge	23	1 10	11	9
Mill Creek	25	1 20	13	11
Kelly's Mill	30	1 25	13	11
Mansfield	31	1 30	14	12
Covington	36	1 40	15	13
Blossburgh	41	1 50	16	14

Coal going north same rates as last year. This schedule of rates adopted, by mutual agreement of both parties, for one year, commencing March 1st, 1854.

(Signed) H. W. BOSTWICK,
P't of C. & B. R. R. Co.
JOHN MAGEE,
Assignee of Lease.
J. O. STEARNS, *for P't.*

72

	Erwin Centre.	Lindleytown.	Lawrenceville.	Somers' Lane.	Mitchell's.	Tioga O. Station.	Berry's Bridge.	Mansfield.	Covington.	Blossburgh.
Corning	25	40	45	55	60	65	70	95	1 00	1 25
E. Centre	.....	15	20	30	35	40	45	70	85	1 00
Lindleytown	.....	.....	10	20	25	30	35	60	75	90
Lawrenceville	.....	.....	.....	10	15	20	25	50	65	80
Somers' Lane	.....	.....	.....	.....	10	15	20	45	60	75
Mitchell's	.....	.....	.....	.....	.....	10	10	35	50	65
Tioga O. Station	.....	.....	.....	.....	.....	.....	10	30	45	60
Berry's Bridge	.....	.....	.....	.....	.....	.....	.....	25	40	55
Mansfield	.....	.....	.....	.....	.....	.....	.....	.....	15	30
Covington	.....	.....	.....	.....	.....	.....	.....	.....	.....	15

This schedule of rates adopted, by mutual agreement of both parties, for one year, commencing March 1st, 1854.

(Signed) H. W. BOSTWICK,
P't C. & B. R. R. Co.
JOHN MAGEE,
Assignee of Lease.
J. O. STEARNS, *for P't.*

It was conceded by the counsel for the respective parties that the defendant run the road down to the termination of the contract.

It was also conceded that the defendant received all the earnings that were received upon the road.

It was also conceded that the first action was brought for the earnings from the first of June, 1854, to the first of January, 1855.

73 The plaintiff's counsel also offered in evidence a mortgage and bond made by the Corning and Blossburgh Railroad Company to John Magee, dated 29th November, 1852, to secure the payment of $25,000, payable, one-half in twelve months, and one-half in twenty-four months, with semi-annual interest.

Also, evidence of the foreclosure of that mortgage by advertisement and sale, upon the 7th of July, 1855, for the sum of $16,613.47, bid off by the present plaintiff, the Blossburg and Corning Railroad Company.

Also, judgment-record between Hiram W. Bostwick, et al., plaintiffs, and The Tioga Coal, Iron, Mining and Manufacturing Company, defendant, filed 22d May, 1844, for $31,994.29.

Also, an execution upon that judgment, dated 23 October, 1852.

Also, the sheriff's return of the satisfaction of the judgment out of the sale of the real property, December 31, 1852.

Also, the certificate of sale reciting the sale of the property to John Magee.

Also, deed from the sheriff to John Magee, of date April 1, 1854, consideration $51,936.34, conveying the railroad and its appurtenances.

Also, deed from John Magee and wife to the Blossburgh and Corning Railroad Company, dated June 13, 1854, consideration $250,000, acknowledged on the 13th June, 1854, before N. Sawyer, justice of the peace, and recorded 14 June, 1862, at six o'clock past meridian.

Also, a resolution made by the Corning and Blossburgh Railroad Company, on November 23, 1853, reciting that Magee had loaned to them $25,000 upon bond and mortgage, and authorizing the transfer of these contracts with the Tioga Railroad Company, and
74 also certain leases with Corning and Fellows, to Magee, as collateral.

Also, an agreement made by John Magee, 22d March, 1854, to perform the contracts which the Corning & Blossburgh Railroad Company had made with the Tioga Railroad Company.

Also, an absolute assignment made 23d November, 1854, by the Corning & Blossburgh Railroad Company to John Magee.

Also, an assignment made on the 23d November, 1853, between the same parties, as collateral.

Also, an assignment made by John Magee to the plaintiff, dated 13th June, 1854, assigning all these contracts and leases to the new company. (All or any of the documents and papers given in evidence may be referred to by either party on the argument;) which said paper sand documents so offered were received and read in evidence, and established the right and title of the plaintiff as the grantee of the Corning and Blossburg Railroad and its franchises, and assignee of the several contracts set out in the declaration in this action at the time this suit was commenced.

JARED A. REDFIELD was sworn as a witness for the plaintiff, and, being examined by Mr. Rumsey, testified as follows:

What is your business?

I am engaged, at present, railroading.

How long have you been engaged in that business?

About twenty years.

Superintendent of railroads?

A good part of the time.

Have you ever had charge of the Corning and Blossburgh railroad?
No, sir.
Have you ever been over it?
Yes, sir.
Do you recollect going over that road, to examine it, in 1862?
Yes, sir.
For the purpose of seeing what its condition was?
Yes, sir.
What time in 1862?
It was in the fall some time.
In October?
Yes, sir.

75 What was its condition? Was it in good condition, or bad condition, generally?

It was not in what might be called first-class condition.
What defects were there in it?
The ties were defective, to a considerable extent, and the iron was defective, and the ditches were defective.
What about trestle-work?
Most of the timber about the road was defective.
Did you make any particular examination as to the particular defects?
Yes, sir.
What defects did you find?
We went up by train to the upper end of the road, and then walked this way, from Lawrenceville down.
Who was with you?
Pratt, Fisk, Dannals, and one or two gentlemen from Philadelphia.
State the particular defects you found.
We found that, in our judgment, it would require about six hundred ties per mile.
What was the condition of the ties in there?
Many of them were rotten. The estimate we made would be that about one-fourth should be made new.
Was that fourth fit for use?
No, sir; more or less of them were rotten, and many of them were very defective, but we concluded that the renewal of one-fourth would make the road in good, safe running condition.
What would it have cost to have put these ties in, from October on?
The estimate we made at that time was 27 cents apiece for hemlock, and 37 cents each for oak.
Does that include the cost of the ties and putting them in?
Yes, sir; three hundred hemlock and three hundred oak to the mile.
How long did that price for ties continue?
They advanced, in 1863, to a much higher figure.

76 What time in 1863?

I couldn't say; during the year, I should think, along in the spring and summer.
How much did they go up? State what they were worth, in the spring of 1863.
(Objected to.)
How long a time would it have taken to have repaired the road, and put in those ties, using the road as roads are usually used?
You would have to put on a force sufficient to have repaired it within a month.
What else, besides the ties, were out of order?

The ditches I have named.

Did you make any estimate of the cost of cleaning out the ditches?

We did.

What was the estimate you made?

About $100 per mile.

Is that your judgment of what would have been the expense?

Yes, sir.

What else besides the ditches?

The fences were also very much broken down.

What estimate did you put upon the necessary repairs to the fences?

Fifteen hundred dollars, we thought, would have——

(To this evidence the defendant's counsel objected. The evidence was received subject to the objection.)

What was the estimate?

$1,500.

What next?

The next item was trestle-work. At this place it was put down at $1,000 to replace it.

You mean at Corning?

Yes, sir; where they were in the habit of running their trains to dump.

A thousand dollars would not rebuild the whole of that trestle-work?

No, sir. My estimate had reference to about five hundred feet of it, that was considered, at the time, unsafe. Some of it was short, and some longer; and it was estimated that a thousand dollars would rebuild it.

77 In your judgment, to make that trestle-work safe, was it necessary to do that?

Yes, sir; but I wouldn't say the road couldn't be run as it was. The trains were being hazarded every day.

What else?

We found three cattle guards that required building. These we put, at $4 each, on the old foundations.

Was it worth that to rebuild them at that time?

Yes, sir. That is a rather low estimate.

What else?

The culvert at the end of the cut above Irwin Center would cost $300 to repair with dry masonry.

What else?

For cutting, pulling, and burning brush. That would, perhaps, need some explanation. If you let the brush grow up so close to the track as to shade the road, it prevents the road-bed from drying out, and it is injurious. In this case they had been allowed to grow up, and were injuring the road. It would take two gangs of men two months to remove them, and would cost $260 to do it.

What else?

There were four hundred and seventy-five bars of defective iron eighteen feet long, weighing seventy-one and one-fourth tons, gross weight, worth, at half-price, $29 per ton. It would cost that to reroll them and replace them. The total would be $2,566.25.

Were these rails in such a condition that they required rerolling to make them a part of a road in good repair?

The four hundred and seventy-five bars were picked out as needing rerolling. They were broken at the ends and laminated. There were a

good many that were worn, and not in good repair. Those four hundred and seventy-five were particularly defective.

Were there any other defects in the road that you noticed?

Nothing else.

Being cross-examined by Mr. Dininny, he testified as follows:

78 Name the persons who were with you?

I recollect Pratt and Fisk, and I think there were other gentlemen who didn't subscribe to the paper. They were from Philadelphia. Perhaps they did subscribe to it.

In what way did you examine these ties?

By taking hold of them and feeling them. We made a pretty thorough examination of the road.

You were superintendent upon what road?

The Williamsport and Elmira.

How did that road compare with the road of which you were superintendent?

It might have compared tolerably favorably.

Do you mean to be understood that those four hundred and seventy-five bars were so defective as to be unsafe?

Yes, sir. They were so laminated and worn as to shake the machinery. You can tell very soon, in riding, when you strike a rail that is peeled, and in such cases it is more likely to break down cars or machinery.

Did you know at that time anything about the amount of tonnage carried over the road?

No, sir.

Did you understand the weight of the locomotive?

No, sir.

I suppose it would be necessary to take that into account, and the time and speed of running, in deciding that?

Yes, sir; but such a rail would injure the machinery, whatever it was.

It would injure it less if the speed was slow?

Yes, sir.

And it would injure it less if the locomotive were of less weight?

Of course the liabilities would not be so great to break down or go off the track.

What was the weight of the locomotives you used then?

From twenty-three to twenty-six tons.

About how long will a tie ordinarily last, in a road used as the Tioga was used at that time?

79 It depends upon when the tie is cut. If cut at certain seasons, and of a certain class of timber, it will last from five to seven years. I have known ties to rot and become worthless in two years, and have known others within twenty rods of them to last five years. It makes a difference sometimes what land they lie on.

Were those ties in such condition as to make it unsafe to run over the road? Did they need to be replaced immediately?

You could have run the road for some time, but you took more risks in running it than if the road was in good condition. There were some places where the ties were good, and in some places they all needed replacing. It was my judgment at the time that the number of ties I mentioned should have been put in that fall.

How many ties needed to be replaced immediately in order to place it in good fair condition?

All the ties I have mentioned ought to have been put in that fall to make it a good fair road; still the road might have been run for a year to come, and perhaps could have been run without any trouble, but you would have been liable to the trouble every time you run it.

Do you know anything of how soon those ties were replaced?

No, sir.

Speaking of this fence, would it take that amount to make it a good, new, permanent fence all through?

Yes, sir.

The whole way?

Yes, sir; on both sides.

You estimated for a new fence?

No, sir; simply to put this fence in good condition.

What portion was there where no fence had ever been built?

I am unable to say. I don't think we took into account the building of fence where there was none. There were some side-hills.

You didn't include any new fence there?

No, sir; I don't think it included or contemplated any new fence where there had been no fence.

80 Did you make an estimate of the amount of lumber it would take to repair it?

Yes, sir; I think we did, at the time.

Do you mean to say that there were places where it was necessary to use new lumber?

In some places it would require new boards and posts, and in some places the fence had been burned.

Have you any recollection of the amount of boards or posts that you thought necessary?

No, sir.

Upon this question of brush, where was the brush growing?

I think there were a good many brush above Lindley, between there and Millertown, and above Millertown, and along by Erwin Center, and this side of the Six-Mile Station down by these mills.

In estimating the expenses of cutting out that brush, to what width did you intend that it should be cut out?

To the fences, or so as to let the track be clear.

What width of brush was there at any one point on the road needing to be cut?

At some points it would require a rod in width, commencing very close to the ditches. In some places the ditches were nearly obstructed by them.

How large were they?

They would vary from the size of a man's arm down.

What portion of the length of the road were the brush on?

I should think now, from recollection, that there might have been four or five miles where there was more or less brush. In some places there were less, and in some more.

You speak of the culvert at Erwin Center; tell us *one* that needed repair.

I think it had commenced caving and breaking in, if I recollect right about it.

Had you been over the road before?

Yes, sir; a great many times.

Had you noticed that culvert?

Not with a view of examining it.

81 Had you ever noticed it before?
I don't know as I ever did.
Have you since?
No, sir.
You don't know that it remains now as it was then?
No, sir.
Or that it had been so for ten years before that?
No, sir.
Where were the ditches in such a condition as you speak of?
The entire length of the road.
Was there no portion of the road that had ditches sufficient?
There might have been, but it was my judgment that they needed repair the entire length.
What was the difficulty with them?
They had not been cleaned out, and the mud had run in and the water-courses were obstructed, and made the road too damp.
There were some places where there could be no ditches?
You have got to have a ditch on the upper side, or you can't run the road. It would be flooded all the time.
What was the condition of the road—was it a good surface?
Yes, sir; the line and surface were very fair.
Could you keep a road with a good surface and line with the ditches filled up in that way?
Yes, sir; where you don't run very fast.
They ran slow upon this road?
Yes, sir.
The speed has always been slow, and is now?
Yes, sir; I think so.
What was the difficulty with these cattle-guards?
They were rotten. The timbers were rotten.
The trestle-work you speak of was in Corning?
Yes, sir.
The same trestle-work that is here now?
I don't know. It is on the same location.
82 At what particular point was it out of repair?
I am not able to state whether it was the extreme lower end or not. I think it was.
Was the defect al' together?
I think it was all in one place. A portion, I think, was available, and another portion was not safe.
Had it, to appearances, all been built at the same time?
I don't recollect as to that; I should judge not.
In your estimate to make that in repair, do you estimate for entire new trestle-works?
Yes, sir; for that piece of it. There was a portion we thought ought to be rebuilt. I think now that there was a portion of it that had been rebuilt. I am not clear on that point.
I understood you that the rails in that road, principally, might have run for a year, with a slow speed?
Yes, sir; I think so.
Were you acquainted with the condition of the Erie Railway at that time?
Yes, sir.
How did this road compare with that?
(Objected to by plaintiff's counsel. Objection overruled.)
A. There were some places on the Erie that this would compare very

favorably with. As a general thing with the Erie, taking into consideration the purpose for which this road was run, at slow speed, and with light locomotives, I should regard the Blossburgh road, for the purposes for which it was used at the time, as equal to the Erie, for the purposes for which it was used at the time.

I want your opinion as to whether this road, with a 22 or 24 ton locomotive, running the trains as they were run at the time, was in a safe condition.

In my judgment the road was not in good, first-class condition, and I did not consider it a safe road for operating machinery over. You might have run a year, and not got off, and you might have got off in a day.

83 There might be a rail that would break, if they had all been new?

That is very true, sir.

Do you mean to say that it would not have been safe to have run that road with a speed of ten miles an hour and with such locomotives?

In my judgment, I should not regard the road as a safe one for any great amount of speed, or for fast running. The road might have been run a year, or longer, without anything more than the simple, ordinary patching up, and not have got off the track; but, in my judgment, it required these repairs to make it a good road.

Being re-examined by Mr. Rumsey, he testified as follows:

Besides these six hundred ties per mile, were there other ties that were worn?

Yes, sir. Some of them were nearly new.

There were all grades of ties, down to those that were worthless?

Yes, sir.

And those were ties that should have been replaced immediately?

Yes, sir. There is no doubt that they should have been put in that fall, for the safety and interest of the road.

The fences you speak of were only those gone out of repair?

Yes, sir.

How many years' growth was this brush?

It varied from the size of a man's arm down.

Had the brush been cut in some years?

I should think not.

Do you recollect the creek crossings?

There were two or three where the sills were defective.

Did those need replacing?

I don't recollect. I think there were a few crossings where the sills were defective.

Would it have been prudent, at all, to have run that road at
84 all after you were there, without replacing those six hundred ties?

The ties should have been replaced, for the interest of all parties. If a man was consulting his own pecuniary interests it would have been necessary.

Would the danger have been increased by an increased rate of speed?

Yes, sir. The speed was not so great as to knock it out of line, or to laminate, as much as would have been done with speed.

What amount of speed could have been put upon the road with safety, taking it as it was?

That is a hard question to determine; we were so poor we could not fix our road, and sometimes we were off, and sometimes on the track.

What was the condition of the Erie Railway, at the time you were asked to make this comparison?

There were some parts of it that were not any better than this.
Was that safe?
I don't know; there were points on the Erie road that were not regarded safe for a high rate of speed.

Being again cross-examined by Mr. Dininny, he testified as follows:
You would have continued to run the road while replacing the ties?
We should have probably run the road as long as we could.
And put in the ties as you went along?
Yes, sir.
I want to ask you whether Mr. Rumsey was with you at the time?
I really could not say.
Was there any representative of the Tioga Railroad along?
I think so—two or three.
Can you name them?
No, sir. I am quite sure there were one or two of them.
Did any of them sign the paper?
I think not.
Who drew up this paper?
Mr. Rumsey, I think.

85 HENRY C. FISK was sworn as a witness for the plaintiff, and the paper to which the preceding witness had referred in his examination was handed to him by Mr. Rumsey.
(The defendant's counsel objected to the witness being allowed to refer to the paper. The objection was overruled.)

Being examined by Mr. Rumsey, Mr. Fisk testified as follows:
What is your business?
I am engaged in railroading.
How long have you been engaged in it?
Sixteen years.
Are you superintendent of any railway?
I am a division superintendent on the Erie.
In 1862, were you engaged in railroading?
Yes, sir.
On what road?
The Buffalo, New York and Erie.
Did you in October, 1862, go over this road to examine it?
Yes, sir.
Who was with you?
Mr. Magee, Mr. Redfield, Mr. Pratt, Mr. Dannals, Mr. Rexford, Mr. Holmes, and Mr. Browne.
Was I there?
I don't recollect it.
What was your purpose in going over that road?
To examine it and see its condition.
What was its condition? Tell us the defects you found in the road.
I didn't consider it in good condition.
Tell us the defects in it?
We found the ties very poor.
What proportion of the ties were in such condition as that they required to be replaced immediately?
(Objected to.)
Were any of them in a condition that they needed replacing?
Yes, sir.
What proportion of them needed immediate replacing?

86 We made an estimate at six hundred ties to the mile. We did not make any especial count of them, but we made a careful estimate.

How did you go over the road?

We walked over it.

What was it worth to replace those ties?

At that time, to have replaced them would have been worth 27 or 28 for hemlock, and 37 or 38 for oak.

What proportion of them should have been oak and what proportion of the hemlock?

Half of each.

What other defects did you find?

We found some poor iron.

What was the condition of the ditches?

The ditches were, if I recollect right, not in good order; not ditched as a road should be. They were considerably filled up.

What would it have been worth to have cleaned them out as they should have been?

About a hundred dollars a mile.

What was the condition of the fences?

They were quite poor.

I believe it was not fenced all the way?

I think some portion of it was not. Of what fencing there was, some of it was poor and some of it was in good order.

Did you make an estimate of what it was worth to have placed them in good condition?

We made an estimate, at the time, of $1,500, for repairing the fence.

Would it have cost that, at the time, in your judgment, to have replaced the fence?

I think so.

How was it with the trestle-work at Corning?

We looked it over, and there was an estimate made of the cost to place it in good condition.

What was the estimate?

We reported here that it would cost a thousand dollars.

Did you give that trestle-work a thorough examination?

Yes, sir.

Was it safe at the time to run trains over?

It did not look, at the time, as though it was very substantial.

87 Would it have cost that amount to have repaired and placed it in good condition?

Yes, sir; I think it would.

How many cattle-guards required repairing?

Some of them were in bad order. We reported eight cattle-guards.

What, in your judgment, would it have cost to have replaced or put them in good condition?

There was an estimate made at the time.

What was your estimate?

Four dollars for each cattle-guard.

In your judgment, would it have cost that?

Yes, sir; it would. I should think it was a low estimate.

Did you notice the culvert at the cut at Erwin Center?

Yes, sir.

What would it have cost to have put that in good condition?

I think I recollect about that. In my opinion, it would cost about $300 to put it in good condition.

What is the usual way of making those culverts; dry masonry, or with mortar?

The usual way, now, is with mortar. That estimate is made for dry masonry.

Which is the most expensive?

Mortar.

Was there anything in reference to the brush that attracted your attention?

Yes, sir. There was considerable that needed cutting.

Could you state about how long it had been growing?

No, sir. Some of it was quite small, and some of it was as large as my arm, or larger.

What would it have cost to have cut that?

I estimated it, at the time, at $260. I think that was a low estimate.

Was it necessary, for the safety and protection of the road, to have that brush cut?

Yes, sir.

Was there any of the iron in a condition to require that it should be replaced?

Yes, sir; some of it was in bad order.

88 Were the number of bars counted?

Yes, sir.

How many were there?

Four hundred and seventy-five.

How were they defective?

By being worn and the ends broken.

What estimate did you place upon the replacing of those?

Seventy-one and one-fourth tons, at $29 a ton.

Was it necessary that they should have been replaced, for the safety of the road?

Yes, sir.

Were the other rails upon the road somewhat worn?

Yes, sir; but not so much.

Not so much as to require them to be replaced?

No, sir. I think not.

Did you notice the timbers over the creek crossings?

Yes, sir. Some of them were poor.

Do you recollect whether any of them were good?

My recollection is, that the timbers, generally, were poor. I have no recollection of seeing any new timbers.

Being cross-examined by Mr. Dininny, he testified as follows:

Do you recollect anything in particular about it, except from that paper you have in your hand?

Yes, sir.

Could you tell a single estimate you made, except by looking at the paper?

I don't think I should have remembered the exact amount of ties.

Where was that paper made?

I don't know.

Where did you first see it?

At the Dickenson House, I think.

Was it all drawn and finished, at that time?

It was as it is now, I think.

You don't know who drew it?

No, sir.

You didn't?
No, sir.
You think the first you saw of it was at the Dickenson House?
Yes, sir.
89 When was it, with reference to the time you went over the road?
I think it was the same evening.
When were these estimates made that you speak of?
I think the same evening.
Where were they made?
At the Dickenson House, I think.
You walked over the road and came down to the Dickenson House, and made your estimate?
Yes, sir; I think so. The memorandums were taken on the road.
Did you count the number of bars?
Yes, sir.
How were these bars counted, by each one, or did you estimate the number of bars?
I think they were counted by some one of the parties.
Did you count them?
I didn't the entire portion.
Do you know that anybody did count them?
Yes, sir.
Who was it?
I can't tell.
How many did you count?
I have no recollection of the number.
Can you tell the distance you traveled in counting what you counted?
No, sir.
What do you mean about the bars being broken?
The base of the bar and the chair.
Was it any more than the flange of the bar?
Yes, sir; and the tops.
Were the tops broken?
They were worn.
Tell me how many ties you counted that you can swear were poor, and wanted to be taken out?
I can't say.
Can you say you counted one hundred?
Yes, sir.
Can you say you counted five hundred?
Yes, sir?
How many did you count?
I counted eight or ten hundred poor ties.
What distance of the road did you travel over in counting those ties?
I think, now, we counted over two miles.
90 And estimated the balance?
I can't tell whether they were all counted or not. I remember we counted two or three miles of ties.
What means had you for testing the soundness of a tie?
The majority of the ties that were bad didn't require any instrument.
Had you any instrument?
No, sir.
Had the company?
I don't recollect.
You judged of the ties by looking at them?

Yes, sir.
You had no axe?
I didn't.
Was there any used in the company?
I don't recollect.
You don't recollect that there was any?
No, sir.
Did you count the ties the whole distance?
No, sir.
Were they counted by any of the company?
I don't recollect, positively. I think a portion of the road was made by counting and estimating.
How did you get at the estimate that one in four needed replacing?
I think that was so in the first mile or two.
Can you tell, from recollection, how many were unsound in a mile?
No, sir. I can't tell the exact number in a mile.
You speak of these ties as one-half oak and one-half hemlock. Is it actually necessary that one-half should be oak?
It is generally considered safer.
Is it not a fact that the Erie road and the Blossburgh and Tioga road are putting in miles of road without an oak tie?
I didn't know that fact.
Were half these ties oak?
No, sir.
What portion were oak?
I don't recollect.
Why do you say it was necessary to make it half oak?
To make a good road.
You could make a good road of hemlock?
I should consider it safe.
91 Is it necessary, to have it safe, to have oak ties?
Yes, sir; to make it first-class. I think a road can be made safe with all hemlock ties.
Wouldn't they be as safe as oak?
No, sir. The wood is apt to give, and it isn't as safe.
Where do you put the oak?
At the joints and quarters and centers.
How is a first-class road made?
Of oak ties.
You speak of the ditches being out of order. What was the difficulty with them?
They had filled up a good deal.
How had they been filled up?
I think by the cuts.
What portion of the road was in that condition?
The ditches were generally pretty bad.
Tell me what portion of the road the ditches were filled up?
I couldn't give you the number of miles.
Tell me in what proportion of the road the ditches were bad?
The ditches on the entire road wanted cleaning out. Some were worse than others.
Do you mean to say that some of them were in good, fair condition?
I don't think any of them were such ditches as are usually made on railroads. They should have been widened and cleaned out.
And that would have cost a hundred dollars a mile?
Yes, sir.
How did you estimate the cost of repairing the fences?

I think it was estimated at the number of rods required.
Did you estimate the amount of new lumber it needed?
I don't recollect how we estimated.
That don't happen to be in the bill?
No, sir.
Did you estimate the number of posts required to make the fence?
No, sir.
Can you now state your judgment of the number required?
No, sir.

92 Have you any judgment, formed from any estimate of the amount of lumber required?

No, sir.
What portion of the fences needed to be replaced with new?
There was some portion that wasn't fenced at all, and a good deal was poor.
Did you estimate the cost of building fences where none had been built?
I don't know that we did.
You only estimated the cost of repairing the fences?
That is all.
What portion needed to be replaced or rebuilt new?
I can't say.
Did you make an estimate?
Yes, sir.
Did you estimate the amount of lumber and posts?
I have forgotten how we got at it.
Did you assume to measure any portion of the fence?
I don't remember.
How did you examine the posts?
We examined some portions of the fence standing up.
Were the boards suitable to be used again?
Some of them were suitable.
What was the matter with the others?
They were old, and some of them had drawn the nails through, and some of them were not nailed on the ends.
How did you examine the timber of the trestle-work?
We looked at the general work.
Do you undertake to say you can tell by walking along and estimating the defects?
Yes, sir; where it is very poor.
Don't you know that new trestle had been put in?
Yes, sir.
Wasn't that good?
Some of it was.
On that portion the posts were as many again as in the new part. The trestle-work, when it had become decayed, had had new bents put in?
Some of them were new.

93 If the new ones were in the centre of the trestle, that would have made it as substantial as if new?

No, sir; there wouldn't have been more than half as many, and it wouldn't have been so strong. I don't recollect how many, or how thick the new ones were. I think the old ones had been taken out and new ones put in.
I understood you to say that a thousand dollars was to replace the entire trestle work?

Yes, sir; I think some of those were better than others.

You didn't examine them very thoroughly. How was that culvert at Erwin Centre, constructed?

I think it was laid up with a straight wall, dry.

Had you ever seen it before?

No, sir.

Or since?

No, sir.

You don't know that it is now the same as then?

No, sir.

How much brush was there on the road?

A number of miles.

How many miles?

I can't say.

Collected together, how many acres would there be of the brush?

I couldn't tell. It might have covered twenty acres.

Do you mean to say you think it would have covered twenty acres?

I think it would, the way it was placed.

About four hundred and seventy-five bars were defective. Were they all so defective as to need to be replaced immediately?

I think they were.

None of them were safe enough to run over?

They would have been considered so in other roads.

I am speaking of this road now. State whether, from what you know of this road and its use, those rails were necessary to be replaced immediately?

I think they should have been, as soon as the iron could have been obtained.

94 Do you say the road was not safe enough to run a 24-ton locomotive, at a ten-mile rate of speed, with the ordinary tonnage that was carried on that road?

With that rate of speed it might have got over it safely, and it might not.

Would you have considered it safe, if you had run the road?

I should not have thought it safe, but I have no doubt I should have run it.

Have you not been running for the last six years, over a road with iron just as bad, or worse than that?

No, sir.

None of it?

No, sir.

You mean to say that, on no part of the road, you have run it as bad as that iron?

No, sir; no part of it.

As bad as any of it?

No, sir; not as bad as any of it.

Were the persons who signed this paper all present at the time of signing it?

I think we were all at the Dickinson House, and all signed it the same evening.

Being re-examined by Mr. Rumsay, he testified as follows:

This whole party were over that road together?

Yes, sir.

Did they meet at the Dickinson House after arriving here, and sit down and calculate the value of these necessary repairs?

Yes, sir.
Do you recollect whether or not it was all done before they separated?
Yes, sir, it was.
When you lay a road with hemlock ties entirely, does it require a larger number of rails?
Yes, sir.
How many more would you put into a mile?
Three hundred always.

Q. By the referee: How many ties are there, ordinarly, to a mile?
Twenty-eight hundred.

Mr. Rumsey resuming: How many of oak and hemlock?
94 That is the number, if they are all hemlock with the joints oak.
If we were going to have a greater quantity of oak, we should put in less ties.
Do you recollect whether any portion of those rails had been broken? or, first, had the fire made any ravages on the fence?
Yes, sir.
Were there portions where the fence lay entirely down?
Yes, sir.

Being again cross-examined by Mr. Dininny, he testified as follows:
What portion had been burned?
I couldn't tell you. I recollect that fence had been burnt and repaired, and burnt boards nailed on again.
How much?
Can't say.
What is the weight of the locomotives you run on your road?
From thirty to forty tons.
If you were going to run a 24-ton locomotive, you wouldn't need so many ties?
I shouldn't make any difference.
Q. By Mr. Rumsey: Wasn't there a man with an axe along with that party?
I tried to think, when you spoke of it, but I can't say.

PHILANDER J. DANNALS sworn as a witness for the plaintiff, and being examined by Mr. Rumsey, testified as follows:
What is your business?
Superintendent of track repairs.
How long have you been?
Seventeen years.
On what roads?
I commenced on the Corning and Buffalo road.
Did you go over this Blossburgh and Corning road with Magee and others?
Yes, sir; to examine it.
When was it?
I don't recollect. It was some time ago.
What was your purpose in going over there?
I was asked to examine the ties and iron, etc.
96 To see the condition of the road?
Yes, sir.
Had you been accustomed to the repairs of roads?
Yes, sir.

Had you any knowledge of what repairs were necessary to be made in a road?

Yes, sir.

Did you make a thorough examination of that road in company with these persons, with that view?

Yes, sir.

Do you recollect whether a man was along with an axe?

I think there was one, but I don't recollect positively.

How did you go over the road?

On foot.

Is there any difficulty in telling whether a tie is in good condition, with or without an axe?

Sometimes we can kick off an end.

What was the condition of the ties in that road?

A portion of them were very bad, and a portion of them were not.

Do you recollect whether any portion had been relaid?

There were some good ties in.

Were there any bad ones?

Yes, sir.

How many, a mile, were there that were bad?

I think I counted a mile or so.

Did you make an estimate from the minutes you kept on the road?

Yes, sir.

Where did you do your figuring?

At the Dickinson House.

Before or after the party had separated?

Before. I think every one was in the room, and each figured by himself.

How many ties did you find that were unfit to be used?

I didn't keep any memorandum after we separated. It appears that we found six hundred.

Do you recollect that there was that amount?

Yes, sir.

97 Six hundred on the whole road?

Six hundred to the mile. They were ties that I should have taken out if I had been at work on it.

How were they defective?

By the rails gnawing into them, and rotted and split out.

What was it worth to replace those ties then?

It appears that we said then that it was worth 27 cents a tie—$27 a hundred.

What were they worth, at that time, to replace them in the road?

$27 a hundred for hemlock, and I think we were paying three shillings for oak.

Question by the referee. Do you speak of them from recollection?

From the paper. If I had my memorandum-book here, I could tell.

Mr. Rumsey, (resuming.) Does that paper refresh your recollection, so that you can say that they were worth that then?

Yes, sir. I signed this paper.

Did you know, at the time you signed that, that what you stated there was true?

Yes, sir.

How was that road spiked?

I think it was spiked very well. Some of them the heads were broken off.

What other defects were there in the road besides the ties?
The ditches were filled in many places full, sloughed in, and slid down.
Did you make any estimate on what it would cost to clean them?
We did. We compared opinions.
What was your opinion at the time?
What it states in here.
How much was that?
$100 per mile.
Is that your judgment of what it was worth per mile?
Yes, sir, to put them in in good order.
That road is built on a side-hill?
There are a good many side-cuts.
What else was out of condition on the road?
98 Underbrushing to do. There was a good deal of brush on the side-hill. I recollect it ran down to the ditches, in many places.
Did you examine it with reference to what it would have cost to have taken it off?
Yes, sir.
What, in your judgment, would it have cost to have taken it off?
$260. That is cheap enough.
Have you been accustomed to cutting brush on roads?

How about the fences?
I think the number of rods *were* counted where it was broken down, and estimated.
Any boards broken?
Yes, sir; and burned.
Did you make an estimate of what it would have been worth to have repaired it?
Yes, sir. There was an estimate made.
Did you make one?
Yes, sir; and compared it with others.
What did you make yours?
$1,500.
What, besides the fences, was out of repair?
The iron.
Did you make any estimate in reference to that? Did you count any portion of it?
I kept a minute of it awhile, and then others did. I think Pratt counted a large portion of it.
You kept your memorandum of that?
Yes, sir. We were not together all the time.
Did you examine every bar on the road?
Yes, sir; I did.
How many bars were there that were defective?
Four hundred and seventy-five.
How defective were they?
I considered that they ought to be replaced.
Why?
It was for the best interests of all parties. There was a liability of getting a train off.
Were they such as were fit to be on a road?
Not for a good road.
99 Were any of those broken in the middle?
They were laminated.
What was it worth to have had those rerolled and relaid?

I don't know.
Do you know what the cost of iron was at the time?
I think it was about $30.
Did you examine this trestle-work, here?
Yes, sir.
Did you know what iron cost at the time?
I presume I did, but I don't recollect.
You went with them to examine the trestle-work?
Yes, sir.
What condition was it in?
It was bad, in places.
Why?
The timber was decayed.
Was it safe or unsafe for trains to run over?
I didn't consider it safe.
You knew the value of timber at the time?
Yes, sir; but I don't recollect now.
Did you make any figuring as to what it would cost to place that trestle-work in good condition?
Yes, sir; I figured the amount of feet it would take.
Do you recollect the amount of feet?
No, sir.
Do you recollect the price you thought it would take to replace it?
I do not.
Look and see these. Do you recollect whether that was the estimate in the paper that you put upon it at the time?
Yes, sir; I recollect that it was. I shouldn't have signed it if it wasn't.
Have you ever seen it since then?
No, sir.
Were there any other defects in the road, that you think of?
The cattle-guard timbers were decayed.
How many were there?
The paper says eight. That is little enough.
Were there as many as eight out of condition?
I should think there were.
What would it cost to replace them?
I don't recollect.
100 Can't you tell without referring to that?
$4 apiece. That was low.
Do you know that that is low without looking at the paper?
Yes, sir; I think so.
Have you any recollection about the creek-crossings?
I think we stopped there, and I went under it.
Do you recollect a culvert at Erwin Center?
Yes, sir.
Did you examine it?
Yes, sir.
Was it out of repair in any way?
The walls were bulged on one culvert.
Did you form an opinion as to what it would cost to put it in repair?
$300.
With dry masonry?
Yes, sir.
What would it have cost to have it in in mortar?
I don't recollect. It would have cost considerable more.

What is the difference in the price of dry and wet masonry?
I couldn't say.

Being cross-examined by Mr. Dininny, he testified as follows:

You have been engaged in railroading seventeen years?
Yes, sir.
Have you any recollection of what you did, except from the paper, so far as coming to any conclusion?
Nothing positive.
Suppose you had found here that those cattle-guards would have cost fourteen dollars instead of four dollars?
I should have called it right.
Then, if the paper had been altered, you would have said it was right?
Yes, sir.
And so with all the rest of these estimates in the paper?
Yes, sir.
You say that after you got to the Dickinson House, each one of you figured for himself separately?
Yes, sir.
101 Can you recollect whether you all agreed on the amount of ties?
I think we did.
Was there anything you disagreed about?
I think we disagreed about the price per rod of the fence. We all got together.
How did you get together?
We talked it over.
This paper, then, didn't express the individual opinions, but the collective opinions, as they compromised and got together as to the amounts?
We got together and made the prices, and that paper was drawn to correspond with it.
Does this paper express the individual opinions of the party?
I think so.
Did they all agree?
They did, eventually.
Did you all agree at first?
Yes, sir; except on the fences.
How much did you differ upon the subject of the fence?
I don't recollect.
Who gave way, in reference to the fence?
I don't recollect. I think there was ten or fifteen cents a rod difference.
You can't say whether this paper expresses your own opinion, or whether it was the result of other persons' argument upon your mind—who was present?
There were some persons there I don't recollect.
Were Rumsey and Magee there?
Magee was in part of the time. Mr. Rumsey was there.
Did Mr. Rumsey express any opinion in reference to the amount of damages?
No, sir.
You didn't consult him in reference to the opinions you expressed.
No, sir.
How did you "come to go" on the road in the first place?
At the request of Mr. Magee.

Who paid you?
I got no pay.
How long were you engaged in examining?
One day.
102 How long were you in walking down?
I can't say. It was evening when we got there. It was wet, I remember.
Was it morning or afternoon?
I don't recollect.
How many ties did you count that you thought were bad?
I think I counted a mile.
Did you have an instrument to test the ties?
By looking as I went along. We jumped on them, to see if they were shaky, or gnawed any.
Did you count the entire length of the road, or did you count a portion, and estimate the balance?
I counted a portion of them, and others counted portions, and we kept them separate, and added them together.
You think the entire portion was counted.
I do.
About what portion did you count?
I think I counted all of a mile.
Who did you give your memorandum to?
It was torn up.
How did you get at all these matters?
We compared.
How did you get at what it would cost to clean the ditches?
We got at the number of miles, and some of them were on high bluff places, and some had been cleaned out, some.
There was a great deal of brush on the road?
Yes, sir.
What proportion of the road was brush?
I can't say. I am not acquainted with the road.
About how many acres of brush was there?
I can't say. I think we put it into days.
Can you tell how long it would take a man to cut it?
We didn't estimate it in acres.
How long would it take a man to cut an acre?
I can't say.
103 How did you get at the result?
By the general appearance of the road.
Did you have a judgment of the number of acres there were, at the time?
No, sir. I think the estimate of the brush was $260, or along there. I thought it was low, at the time.
You counted the number of rods of fence broken down; how many were there?
I don't recollect. We figured it, and how many feet of boards it would take to the rod.
How many did you figure?
I can't say.
You only recollect from the paper?
I swear to that because it was put down in my presence, and I know it to be correct.
Did you all go along the track together?
We got together at points where we wanted to consult.

How many cattle-guards were there on the road?
I don't know.
Did you count any of the bars of iron?
Yes, sir.
How many?
I don't know; I know that I counted a large portion, and Pratt was counting at the same time, and we agreed on the count when we got through.
You say the trestle-work needed a thousand dollars to repair it?
Yes, sir.
How did you estimate that?
We estimated the amount of material it would take.
Did you figure it?
Yes, sir.
You can't remember how many thousand feet of timber it would take?
No, sir.
Did it need to be entirely replaced?
A portion had been repaired.
Wasn't there some new trestle put in with the old?
I don't recollect.
If there was, putting new timbers in each space, it would be as good as new.
No, sir; it wouldn't help the ends that were decayed.
104 Did you test the timber by boring, or cutting into it?
No, sir.
Did any one in the company?
I can't say.
Did any one test the ties by cutting or boring into them?
Not to my recollection.

Being re-examined by Mr. Rumsey, he testified as follows:

Was there any disagreement about the amount of labor, or was it as to the cost of some of the material?
I think it was as to what a man could do in so much time.
In repairing the old fence?
Yes, sir.
Have you any knowledge of what the fair cost of repairing the cattle-guards would be, except from the paper?
I know what it would cost now. I don't recollect the price of timber then, or the condition of the butts.
Suppose you had found it in there that it would cost $60 or $70 to have repaired one of these cattle-guards, would you have sworn that that was your estimate?
I should have thought there was some mistake about that,
You had a knowledge of the cost of these things, then.
Yes, sir.
Was it within your every-day vocation?
Yes, sir.
And were you familiar then with the examination of rails and ties, for the purpose of seeing what were good and what were not?
Yes, sir.

Q. By Mr. Deninny:

Did you buy any ties along about that time?
Yes, sir.

Mr. Rumsey resuming: You don't recollect whether you counted all the ties?

I did not.

105 What was the general condition of the portion you did count?

They were all in about the same condition as those I counted.

Was there any difficulty in telling whether a tie should have been taken out?

No, sir.

Can you judge by the eye and by kicking on it?

Yes, sir. You can't see exactly, either. You find some the spikes will drop that you think *they* are sound.

Q. by Mr. Deninny. Assuming that that culvert remains without repair until now, would you think it needed that amount of repairing at that time, knowing the amount of tonnage taken over the road?

I think it required $300 at that time. If I had known positively, and I knew how the walls were laid, I might have altered my opinion.

(The plaintiff's counsel offered in evidence an exemplified copy of the judgment-roll, in the action in the court of appeals, between the Blossburgh and Corning Railroad Company and the Tioga Railroad Company, claiming that it was a decision of a court of competent jurisdiction of the same questions involved in this case, and conclusive upon the defendant.)

The defendant's counsel objected to the evidence, that it was not admissible as an estoppel, because it had not been pleaded; that it could not be admitted as evidence for the plaintiff because it had not been pleaded; that if it could be admitted, it was not conclusive; that if it would operate as an estoppel in the State of New York, it was not binding upon the circuit court of the United States, and that the cause of action was for a different sum of money mentioned in the record, and the defenses interposed by the defendant were entirely different and distinct, especially in respect to two distinct differences.

106 (The record was received, and read in evidence and of which judgment record a copy is hereto annexed, and to this the defendant duly excepted.)

ALONZO H. GORTON was sworn as a witness for the plaintiff, and being examined by Mr. Rumsey testified as follows:

Where do you live?

Corning.

Have you had charge of the Corning and Blossburgh Railroad?

Yes, sir.

How long a time have you had charge of it?

I have, as superintendent, for the past two years.

Before that time, what had you to do with it?

I had charge of the track.

The whole of the track, from here to Lawrenceville?

Yes, sir.

How long did you have charge of it?

Since September, 1863.

Do you recollect a portion of it where the original embankment was carried out, and trestle-work put in?

Yes, sir. It is about four miles above this place.

How long was that embankment as originally made?

I should judge it probably was six hundred feet.

Where was it, with reference to the Mulhollen grade?

Just this side, at the foot of the grade.

Do you know that a portion of it went out?

When I took charge of the track there was a portion of it gone.

How much of it went out?

About a hundred feet.

Was it restored, as it was originally, when you took charge of the track?

No, sir.

What was substituted for the original embankment?

There was a trestle-work put in.

How extensive was the embankment?

I think at that point where it was washed out it was about seven feet high.

107 Under whose directions was it restored—by the Fall Brook Coal Company or the Blossburgh and Corning Coal Company?

It was done by Mr. Magee's direction.

What was the condition of it when you took charge of the road?

I didn't consider it safe.

(Objected to.)

What was the condition of it at the time you saw it?

I didn't consider it safe.

Why?

From the fact that the timbers were considerably decayed, and the trestle-work was not sufficiently strong to prevent it weaving to one side, as it was on a curve.

Is that a proper position in which trestle-work should be placed?

I don't know why trestle-work was put there. There should have been an embankment there.

Was there much of a curve there?

Yes, sir, about a 5° curve.

What would be the effect of a loaded train coming down on that trestle-work?

When an engine struck the trestle-work it would naturally throw it sideways, and the trestle-work would weave.

Would not similar results have followed if there had been an embankment?

It would be firm, of course.

What was the expense of restoring that embankment as it was done under your directions?

$259 is what I estimated it at. I estimated it by the yard.

How much did you make of it?

Five hundred and eighteen yards, and a fraction.

What did you estimate it at, the yard?

50 cents.

Was it worth that?

I think it was; being on an embankment, it was necessary to draw it there with a train.

108 Was there any cheaper way of getting it there, than on a train?

Really, I don't know; I think not. I thought that the cheapest way.

Was there any other portion of the road where the river had affected the road as you found it?

I found a place under repairs, when I took the road, right opposite the gang-mills.

Was it where the river came to the road?

Yes, sir.

What was the condition of that piece of road?

The part that was unfinished was washed out, so that the dirt had fallen from the ends of the ties, and, if I recollect right, there were some ties put under the end of the ties to block it up.

For how long a time was the road in that condition?

I should think, probably, there were two hundred feet that hadn't been finished when I first saw it.

Is that at the Mulhollen curve?

No, sir.

Did you go on and complete the repairs?

Yes, sir; I finished the wall that was started from above, and filled in behind it. The wall was started from the low-water mark, and continued up.

How high was the embankment?

Eighteen feet, measuring on the slope.

How much of a slope?

Not much. It would not vary the height six inches.

How much wall was there?

Nine hundred and thirty-three yards and nine feet.

Was there any filling behind the wall?

Yes, sir.

Do you know how many yards of filling?

I estimated it to be about the same number as there was of the masonry.

What was the masonry worth?

$1.50 a yard.

What was the filling worth?

Probably 38 cents. There was a portion of it that was wheeled across the track. Some of it was brought in cars, and some wheeled across.

109 Being cross-examined by Mr. Dininny, he testified as follows:

You took charge of the road in September, 1863?

Yes, sir, I think it was.

What were your duties?

To have charge of the tracks, to keep them in repair. Those duties were assigned to me by Mr. Magee.

What work did you first enter upon, in connection with the road?

I can't tell you what was the first move I made.

How long before you commenced filling in this embankment at Mulhollen grade?

I think that was done in November or December; I had to dig through frost five or six inches. It might have been in December.

When did you make the other repair, opposite the gang mills?

My recollection of it is, I done that before I went and filled that place you spoke of. I think I had the same man to finish up the job that Rogers had there—Lockland.

Do you know how long, before, the embankment had been carried away?

No, sir.

You say the timber in the trestle-work was decayed?

Somewhat. The ends, where they lapped on to the cap of the bent, were somewhat decayed.

Were those timbers so decayed as to render it unsafe to pass trains over them?

I considered it so.

What was the timber the trestle-work was made of?

I couldn't tell whether it was pine or hemlock.

You say that there was, opposite to the gang-mill, gravel washed out and ties lying lengthwise; how long were they along there?

In some places ten or twelve feet.

Had there been a recent freshet?

That I don't know.

How far, under the end of the ties, had the embankment washed out?

It might have been eighteen inches.

110 Had it washed under the rail?

I should judge it had, in one or two places.

Had you any knowledge as to how that embankment was washed out?

No, sir.

Had there ever been a wall built there, before you built it?

Not to my knowledge.

Was there any appearance of any wall having been there?

I think there was, down near where a little creek came across.

What distance?

I am unable to say. Probably thirty or forty feet was not covered up, when I took the job. I took the job, unfinished, and I extended it down the stream further. There was the appearance of a wall being built there and that it stood about perpendicular. I think it only came up three or four feet, probably five or six.

Was there any wall there, more then the mere abutments?

I couldn't say positively. It possibly might have been but the abutments and the return of the culvert.

Did you measure the embankment?

Yes, sir.

Did you measure the filling?

I estimated that.

Did you measure the embankment above the grade?

Yes, sir.

JOHN COWLEY was sworn as a witness for the plaintiff, and, being examined by Mr. Rumsey, testified as follows:

Where do you live?

At Corning, sir.

How long have you lived here?

I have resided here most five years.

Before that, where did you live?

Six miles above here.

Were you employed on the Corning and Blossburgh Railroad?

Yes, sir.

For how long a time?

Since it has been built.

111 Do you recollect the time Magee took possession of the road?

Yes, sir.

What was your business on the road?

I was employed as a section boss.

How much of the road had you charge of, about the time Magee took possession of it?

Six miles or a little over. I think it was a little over that.

Where did your section commence?

A little above the gang-mills dam, and run south.

It run up the river?

Yes, sir.

Did you know the condition of the ties on the road, when Magee took possession of it?

Yes, sir.

Were there any rotten ties on it at the time?

Yes, sir.

About what proportion of the ties, on that section, were rotten?

Well, there were about half of them that were defective, not rotten.

More or less decayed?

Yes, sir.

Was any portion of these so rotten as that they were for use?

Yes, sir.

About what proportion of those?

Perhaps one-third of them that were not fit to be in the road, that is, to be safe.

What was the condition of the iron; was any of it defective?

Yes, sir.

Do you remember whether any of the ends of these were broken, where they went upon the chairs?

Yes, there were some that were broken on the surface—the ends chopped or scaled. There was not many of them broken on the bottom. Perhaps on the chairs, one flange might be broken off.

Were any of them broken on the top, in the middle of the rail, or worn down?

Some of them were scaled off.

Were any of them scaled off, that were not on the curve?

Yes, sir.

112 Do you know where the Mulhollen curve was?

Yes, sir.

Was that on your section?

Yes, sir.

What was the condition of the rails on that curve, when Magee took possession of it?

They were worn, and rounded on the top. It was a short curve, and had a tendency to wear them.

How wide was the bearing part left?

They might have been made three-quarters of an inch narrower than they were when used.

How wide did that leave them?

About two inches or thereabouts.

That was on the inside of the track?

Yes, sir.

Had it the effect to make more play for the wheel?

Yes, sir.

Did it make it more or less safe than it would be if it was the full width?

It would have a tendency to make the train run off. We had to watch the track, and keep it spiked in to keep it the proper *guage*.

Had you any trouble with making the spikes stay?

In such places we had to put in more ties.

Did you put in more ties?

Yes, sir.

Do you remember when the trestle-work at the foot of the Mulhollen bridge, how the original track was constructed?

It was on an embankment, where that trestle-work was; there was a big shower came in June.

When was the embankment built?

When the road was constructed.

When did that go out?

I don't know the year exactly, but I think it was out about four years before Magee took the road.

Was that embankment ever replaced?

Yes, sir.

When?

It was replaced a year after Magee took it.

Who put in the trestle-work?

Mr. Shattuck.

113 Do you know whether there was any more strain at that part of the road than there is upon a straight line?

A train would run faster over it, unless the engineers were guarded particularly against it.

Do you know whether that frame-work ever gave way under the cars?

It didn't give way. It would get out of line. It was rather temporary—not that, but it would get out of line.

Did it get out of line?

Yes, sir; it did get out of line.

Do you recollect the road along by the gang-mills?

Yes, sir.

Was that on your beat?

No, sir; it was on my brother's.

What is his name?

Barney.

Were you ever along there to notice it?

Yes, sir.

How was that originally constructed, down by the river?

There was a piece of wall built part of the way on it, as far as it was necessary to build a wall on it—a slope wall.

What effect had the water upon that before Magee took possession of the road; do you know whether it had washed out or not?

It had; there w*as* some sluice-ways from the side-hills, and the water washed over in heavy rains.

Do you know whether the wall had given away?

It had.

Was it a slope wall?

Perhaps there w*as* about two or three inches to the foot of slope.

Had the wall pressed out of line either way?

The stone was slaty or shelly, and it worked and gave way, and the stone w*ere* not good.

When did it first give away, that you noticed?

It hadn't been a very substantial piece of work at any time. The track was laid out pretty close on the wall, toward the river-side.

114 How did the river affect the wall?

I don't think it washed it as much as the water from the upper side. I never noticed that the river or ice-jams affected it much. The water from above had the effect of softening the bank, and the embankment settled under the track.

Did any of the embankment settle down?

Yes, sir.

How did they keep the track up where the embankment slid away?

They filled in as well as they could, and put timbers under to level up the track.

How much did the embankment slide away?

I have known it to slide away almost half way under the ties, for short spaces, perhaps a rod or so.

Were there any places it didn't slide so much?

Yes, sir; there was one or two spots where it settled every spring.

For how long a distance was that settling, more or less?

I think there was a couple of timbers put in.

How long a distance did the bank give away?

Thirty or forty feet, perhaps, and they had to put in long timbers and ties to hold it up. This spot was where a heavy sluice of water ran down, and it had to be kept up by timbers until they could get dirt in.

Were there any ties put in to hold up the ties lengthwise?

Yes, sir; blocked under them.

What was the condition there when Magee took possession of that road?

It was filled up around those ties. I think there was dirt filled around them.

Were those ties under them then?

I don't recollect.

Was that the point at which Gorton made a slope wall?

Yes, sir; above and below that.

Did you make any calculation of how much there was of that?

It was about seven hundred feet long that they made a wall.

115 Q. by the referee: How many yards?

I don't remember.

Mr. Rumsay, resuming: Do you know whether there was any filling put behind the wall?

They made a dead slope to the wall, and filled in as they built it up.

How wide was the filling in, and the wall, beyond the railroad, when they completed it?

I think about twelve feet.

Besides what the track lay on?

Including the track.

How far are the tracks apart?

Six feet.

Did you make an estimate of the quantity of earth put into the embankment above?

About the same amount of earth as of stone.

I mean, where the original embankment went out, at the foot of the Mulhollen grade.

That was a hundred feet long, and about seven feet deep.

You didn't figure the precise quantity?

No, sir.

Being cross-examined by Mr. Dininney, he testified as follows:

Did you continue in charge of this section of the road after Magee took possession, the same as before?

Yes, sir.

Was this embankment, at the foot of Mulhollen's grade, upon your section?

Yes, sir.

Will you explain to me how the bars of iron were broken? Were they any more broken than to be peeled off or laminated? Were any broken off?

No, sir.

Did the mere breaking of the corner of the flange, at the bottom, render it unsafe to pass a train over it?

Of course, it would not be safe to leave it so.

Have you been in the habit of taking out all bars that have a portion of the flange broken off?

116 No, sir; not always. I didn't depend on them when they were broken at the bottom.

You didn't take them out?

I did as soon as I could have rails to replace them.

How much must be broken off to render them unsafe?

Perhaps an inch, off from the bottom part.

Did you spike those rails close to the chair, and make them safe?

Yes, sir; we did so.

And allowed the rails to remain in the track?

Yes, sir.

You have done so while in Magee's employ?

Yes, sir; until we had rails to replace them.

Do you mean to say you haven't left them in four months in that way?

Yes, sir.

And years?

No, sir; not years.

You left them in frequently after you had rails to use?

I would replace them before I would replace rails broken on the surface.

In reference to these ties, you say you think there was one-third of the ties that were rotten or unfit for use?

Not rotted, but decayed; the sap rotted off.

Were they so far decayed that they couldn't remain in the track?

They had to remain until they could be replaced.

You never had any accident by reason of these bad ties?

No, sir.

How long before you replaced them?

We kept going over the road, and replaced the worst of them. I continued on the road a year.

About how many had you replaced during the year you remained there after Magee to' the road?

I think I put in about two thousand ties on my section.

About how many did you put in the year before?

I don't exactly know. I was required to make a return of all the ties to Mr. Shattuck, and if he has the returns——

117 Did you put in as many as you did that year?

No, sir; I think I put in fifteen or seventeen hundred.

How many ties would there be per mile in your section?

There are ties in every two feet and a half.

Were you in the habit of making requisitions on Shattuck for ties and iron, as you needed them, while the Tioga Railroad Company had control of it?

No, sir.

Upon what demand were you supplied?

I was supplied as I called for them.

And he supplied you as you called for them?

Yes, sir.

You called for them about as you thought the road needed them?

About as fast as I was able to use them?

You were able to use them as fast as they were needed?

Yes, sir.

And you were supplied as fast as you called for them?

Yes, sir.

Were you supplied by Shattuck with iron, when you called for it?

Yes, sir.

You were left there to exercise your judgment as to what ties and iron you should put in?

Yes, sir.

And you called for and put in what you thought was necessary?

Yes, sir; I could have put in more, but——

Was it the same in reference to iron? Were you to exercise your judgment, so far as iron was concerned?

Yes, sir.

What kind of timber was the trestle-work composed of that Shattuck put in?

Pine.

Was it a good quality of timber?

Yes, sir.

How long had it been in when Magee took possession of the road?

I am not positive. I think it was four years.

118 Was that timber decayed when he took possession of the road?

No, sir; the timber was sound. It was just flatted, and the sap outside had decayed some.

State what the ties were that were furnished you, as compared with the ties originally put in the road.

They were larger ties—hemlock.

Did you put them in closer together?

We did, in curves.

And you continued to keep them in closer together on the curves, until the road was redelivered?

Yes, sir.

Then there were more ties in the curves, when Magee took possession of it?

I think so, but they were larger ties, and they left the space smaller between the ties. When we had larger ties, we put them in place of the old ones.

I want to call your attention to this piece of road down opposite to the gang mills; that wall, in portions, gave out; where was the new wall built, in reference to where the old wall stood?

It was built at the upper end of it.

It was not built in place of the old wall?

No, sir; it was an extension.

This wall that had been built there was not removed by the water, but the wall was simply extended?

I think the old wall gave way, part of it.

When did that embankment give away?

It was a place that settled every spring more or less.

Has it continued to do so ever since?

I am not so much acquainted with the road, but I see it holds its place now about as it was.

Was that embankment washed out up to the ties at the time Magee took possession of the road?

The bank was filled.

The washing out of the bank there was after Magee took possession of the road?

119 No, sir; I said it had, for years before that, settled away every spring more or less, and it became necessary, especially at those

sluice-ways, to pick up some timber to put under the road until it was filled in.

Had it been filled in at the time Magee took possession?

There were spots where the ties would bear over the edge of the bank, where it was supported by this timber and stuff.

The road was in running condition when it was redelivered?

It was a good surface.

Wasn't the foundation solid?

It was safe, at that time, as long as the road was smooth and well surfaced and in line.

Did you have any turn-outs or side-tracks on your section of the road?

No, sir.

How many of these rails were broken off at the flange when Magee took possession of the road?

I think it was about half a dozen.

How long had they been so broken?

For that season; there was one point just below Erwin Centre, part of that year.

How long did they continue in the track after Magee took possession of the road?

Some of them were in the track when I quit the road.

Being re-examined by Mr. Rumsay, he testified as follows:

These timbers were in, along there, to sustain the track, when Magee took possession of the road?

Yes, sir; the end of the ties would reach over the bank. There was no bank ontside of the end of the ties.

Could you keep that track in line, as well as you could if there had been solid earth under it?

The track might have been leveled up, off from the timbers, but the timbers were in there, and were not taken out.

120 Could you keep the road in line as well upon those timbers as as if it had been solid earth?

It would depend upon which side of the track the timbers were. At that spot, it would keep it in line about the same.

There were portions where the earth had fallen away half the way back?

Yes, sir.

And that was supported by timbers?

Yes, sir; the earth was scarce there.

Did they fill it up with earth?

Yes, sir; all around the timbers.

Was it put in far enough to prevent its sliding down again?

No, sir; there wasn't body enough to do so.

It hasn't slid down since then—since it was repaired?

No, sir; I think it holds its shape very well.

Did you ever call Shattuck's attention to the rails on the Mulhollen curve that were worn out?

No, sir.

He was over the road pretty often?

Yes, sir; he was.

Did you have men enough to replace the ties and iron as you wanted them?

I suppose I had my portion of men.

I want to know whether you had enough to replace all the iron and ties that were necessary?

No, sir; I might have used a good many more men to have put them in.

If you had had more men and ties, you could have replaced these rotten ones?

Yes, sir.

Did you do as much work in 1862 as you had in previous years?

Yes, sir.

Do you know whether it was so on other sections?

I don't know.

What were the original ties that had been there? I suppose it had been a trap-rail?

Yes, sir.

What was done with the old rails?

All the oak rails that were considered fit, were cut in two and used as ties.

121 Which of the ties did you rely upon most for firmness and to support the road, those or the hemlock?

(Objected to.)

Did those oak ties continue in the road until Magee took it?

Yes, sir; most of them.

Were they better or worse for railroad purposes than the hemlock ties?

They were better. They would hold spikes better and last longer.

And they remained there until Magee took it?

Yes, sir.

Did they last longer than the hemlock ties?

Yes, sir.

Do you remember hemlock ties being taken out that were rotted, while those remained good after Magee took the road?

Yes, sir.

I understand you to say that a portion of that wall is there still; is that the fact?

I think a portion of that old wall is there now.

Which end?

The lower end.

Was there any of it entirely covered by the new wall?

There might have been; I couldn't be positive as to that. I know the bank was widened out where they made that improvement.

Do you know whether the track at any time washed away so that the Tioga Company moved the road-bed in towards a hill?

They moved the track in.

Where was that?

At this place where the timbers were put under the track, and I think lower down this way the track was shifted. I think it was shifted half the distance that that new work was made.

How much was it shifted in towards the hill?

I think that a part of it was shifted very near the width of the track.

How much of it was shifted for that distance?

Sixty or seventy feet.

122 Did the Tioga Company ever move the track out again to its original location?

No, sir.

In the place down this way, when they shifted the track in towards the hill, how far was that from the place Gorton speaks of as when he did his repairs?

The end this way was always laid on rock, the inside of the track, and close to the rock it couldn't be shifted much. It was shifted perhaps sixty or seventy feet.

Was the track, while the Tioga Company run it, in either of these places widened out so as to enable them to put the track back?

Not that I know of.

It remained until Magee took possession of it?

Yes, sir.

After it was shifted back, were these timbers put under it to support it? Did it wash away after that so that the track was supported on timbers?

That I couldn't tell. I didn't have charge of that part of the road.

Was this timber, that was under when Magee took it, under that portion that was moved?

I think it was. All I know of, where the dirt was scarce it was necessary to find something to support the track and keep it up.

That was where the track was moved towards the hill?

Yes, sir.

How long did you stay there after Magee got it?

A little over a year.

Have you been on a railroad since that time?

No, sir.

Had you worked on a railroad before you went on that road?

No, sir.

That was your first railroad experience?

Yes, sir.

How long were you there altogether?

I was there twenty-five years.

123 You were there when the original road was laid?

Yes, sir.

Being again cross-examined by Mr. Dininny, he testified as follows:

You say you might have used more men; didn't you always have all the men and all the help you called for?

Yes, sir.

He left you there to determine how many men were necessary, and gave you such number of men as you called for?

Yes, sir.

Didn't Shattuck frequently tell you if you needed more men to keep the road in good repair to call for them?

He did.

You speak of portions of the road being moved in; was the track made any worse by that?

No, sir.

Was it made better?

Yes, sir; it had to be moved to get on a solid bed.

And the bed was more solid where it was moved?

Yes, sir.

Upon the subject of the rails wearing around the curves, I suppose all that was necessary to prevent the wheels having too much room was to spike the rails and set them in?

Yes, sir.

You did do that?

Yes, sir.

You don't mean to say that these rails were so worn upon the curves as to make it unsafe to pass over them?

No, sir; so long as the surface was smooth.

You were directed to gauge the road frequently, and narrow up the track where it was necessary?

Yes, sir.

Q. By Mr. Rumsey. I suppose the tendency of a train to get off would be in proportion to the narrowness of its bearing?

No answer.

124 HARDING D. V. PRATT was sworn as a witness for the plaintiff, and, being examined by Mr. Rumsey, testified as follows:

Where do you live?

In Elmira.

What is your business?

I am division superintendent at present upon the Erie Railway.

Where does your division extend from—to?

From Hornellsville to Susquehannah.

How long have you been engaged in railroad business?

Nineteen years.

Do you remember the very social walk we had over the Corning and Blossburgh road?

Yes, sir.

What was the purpose of that walk?

To examine the road-bed, track, etc.

Did you make a thorough examination of it?

Yes, sir; of the track, the fences, etc.

Will you tell me what the condition of the road was so far as regards the ties?

I see that this memorandum of the ties is one I made at the time; six hundred ties to the mile.

What was the condition of those ties?

They were decayed and needed replacing right off.

Did the situation of the road, to make it a passably good road, require that?

Yes, sir.

How did you ascertain the number of those ties?

We counted them on most of the distance.

And how upon that portion that you didn't count?

They were estimated.

How did that portion compare with the portion you did count?

About the same.

What was it worth at that time to replace those ties?

It was worth $10 a hundred to put in ties. I think we paid for them $17 a hundred.

That makes $27 for what kind of ties?

Hemlock. They should be half oak.

What are oak ties worth?

We paid 37 cents for oak.

125 Why do you estimate it at one-half hemlock and one-half oak?

It wanted about that number of joint ties, and they should have been oak.

Do you generally put in oak?

We do when we can get them. We did at that time.

Do you put in hemlock closer when you can't get oak?

No, sir; we put them in as close as we can.

What was the con lition of the fence?

It was down in some places.

Any burnt boards?

Yes, sir. I don't recollect so much about that, but I gave more attention to the track.

Did you form any opinion as to what it was worth to repair the fences?

I don't think I did.

Have you now any opinion as to what it would cost?

No, sir.

What else was out of condition?

The ditches and the cutting of the brush.

What was the condition of the ditches?

The estimate I made was $200 to the mile, to Mr. Magee. I did'nt agree with all of them.

You thought it required more ditching than the rest of them?

Yes, sir.

Is it your opinion that it was worth $200 a mile?

Yes, sir.

What was the condition of the brush?

I don't recollect so much about the brush. I was called to look at the condition of the track. I was then having charge of track altogether, and had for many years.

Do you recollect that there was a large amount of brush?

Yes, sir; I recollect it was talked of.

Is there any necessity of keeping brush off from the track?

Yes, sir.

Whence arises that necessity?

It keeps the track shaded, and it is more likely to turn over.

126 Has it any effect upon the durability of the ties?

Yes, sir.

Did you make any estimate of the expenses of cutting off the brush?

I don't recollect that I did.

What else did you see out of condition?

There were rails that were bad.

Do you know how many of those rails you estimated as being in a condition that they ought to be removed immediately?

I couldn't tell. It would be merely referring to this paper.

You saw that at the time?

Yes, sir.

Isn't it your recollection that that paper was right as to quantities?

Yes, sir.

How many do you make it?

Four hundred and seventy-five is the report that was made at the time.

Did you count the rails?

Yes, sir.

In what condition were those you counted?

They were badly laminated and worn out, and should have been renewed.

Were any of them broken at the flanges?

Yes, sir; a good share of them.

What effect does breaking the flange at the joint have upon the rail?

You can't well keep the joint up with the flange broken, and it would throw one end by the other. It would not hold in the chair.

Do you know what the price of iron was at that time?

I think we were buying at from $40 to $50.

I see you estimate the amount there that it would cost to replace them?

I don't recollect the weight of the iron. I think it was fifty-six, seventy-one and a quarter tons.

You knew, at that time, the price of iron?

Yes, sir. I was buying iron then.

How much would it have cost to have rerolled these rails?

I think we were getting it done for about $23 a ton.

127 Why did you estimate it at $29 a ton?

I didn't look at that. That was correct, probably, at the time.

You did know when you made that estimate?

Yes, sir.

Q. By the referee. Probably it included putting them back in?

Yes, sir; I presume so.

Mr. Rumsey, resuming: Were there rails that would require to be taken out immediately?

Yes, sir. There were rails that would require renewal every month.

Were there more bad rails there than are usually in a railroad?

I couldn't say. Some roads I have seen in worse condition than that.

To make it in good condition, I mean.

Yes, sir.

Do you recollect seeing any new iron on that road?

No, sir.

I suppose there were rails on there in almost every stage of wear?

Yes, sir.

Some of them that would wear longer, and some that were not fit to use longer?

Yes, sir.

Did you look at the trestle-work down below here?

I did not.

Do you recollect looking at the culvert at Erwin Center, at the end of the cut?

I recollect a culvert there that wanted some repairs.

Can you refresh your recollection from that in reference to it?

I don't recollect much about the condition of it. I don't remember that I made any report upon that at the time.

Being cross-examined by Mr. Dinniny, he testified as follows:

Did you examine the track the whole length of the road?

Yes, sir.

Have you mentioned all the defects you saw in the tracks?

There were some cattle-guards I haven't said anything about.

128 I have reference now to the road-bed.

I don't recollect anything else.

You intended to incorporate in this report all the defects that were to be seen?

Yes, sir; I intended to.

This report is signed by you?

Yes, sir, and a certain part of it—that was carpenter-work, that I wasn't an expert in—I didn't examine.

You didn't examine the fences?

No, sir.

Did you intend to say, in signing this report, that it was worth $1,500 to repair that fence?

Yes, sir.

Then you examined it?

Yes, sir; but only a general view of it.

Did you examine the trestle-work below here?

No, sir.

Did you mean to report that it was worth a thousand dollars to repair it?

No, sir; there were bridgemen there who examined that.

As far as the fence and the trestle-work was concerned, you took the estimate of the other men?

I probably paid more attention to the fence then than they did, but I don't know that I made any report on the fence.

Did you count all the defective rails in the track?

I think I did, all that should be replaced then.

Did any one else count the rails?

Yes, sir; I think two other men. I think one of them was from Delaware.

Did he sign the report?

I don't know. I understand he had charge of a road in Delaware as track-master.

Was it necessary for the business of this road, and the character of the locomotives run over it, to have it as substantial as the Erie?

That many ties and that much iron should have been renewed on that road.

Couldn't it have been used without it?

Not without detriment to the road.

129 Couldn't it have been used safely?

It could have been run at ten miles; you would hammer out the iron, though.

At the same time, the ties didn't need to be as permanent as the Erie?

I think, to put the road in ordinary repair, would require that much repair without making a good road of it.

Did you examine the ties with any instrument?

No, sir.

Will not ties sometimes appear to be unsound when they are not?

They will sometimes appear to be sound when they are unsound. I think some of those ties were broken under the rail.

Could you tell how many?

No, sir.

Were there a large number or small?

I was called by Magee, and others were called by the other party.

Who were they?

There were two or three that I understood were for some one other than Magee.

You don't know that the Tioga road was represented at all?

Only that I understood so.

Being examined by the referee, he testified as follows:

These ties that you speak of were such as, in your judgment, required immediate replacing?

Yes, sir; within a month or two, or two or three months, or as soon as they could be.

Upon any railroad which is run for ten years or more, would you expect to find some ties that needed immediate replacing?

Yes, sir.

Were there more ties on this road that required replacing than what you would expect to find upon any road in ordinary good repair?

They were about twenty-two to twenty-four hundred ties to the mile,

and laying six hundred to the mile would be more than the average you would have to lay in a year.

130 What would be the average number?

About one-fourth of hemlock ties.

In a road of ordinary good repair, what proportion would you think would be an average number to be replaced, per mile—probably three hundred a year?

Take our road here, there is no mile, to make a good track of it, that you wouldn't need to put in three hundred to a mile. If there had been three or four hundred a year put in, they would have kept pace with the decay.

Mr. Rumsey, resuming. The ordinary average of ties each year would be two or three hundred per mile, after running five or six years?

Yes, sir.

Did you notice any ties that had, apparently, been put in that summer?

I don't recollect. I recollect of not seeing many new ties in the track.

Q. By Dininny. You couldn't say there were not new ties in the track?

No, sir; but I could say there wasn't a great many.

Could you say there wasn't as many as seventeen hundred on a single section of six miles?

No, sir; I couldn't say there wasn't.

JOSIAH O. STEARNS'S evidence was read from the printed case, by the plaintiff's counsel, upon the direct examination, as follows:

"The tariff of rates, put in evidence, was fixed by myself, as general agent of the Tioga Railroad Company, and John Magee, and H. W. Bostwick, for the carriage of passengers and freights over the roads. The rates were fixed for the public, and were the public rates actually charged the public. No other tariff has ever been made."

131 Being cross-examined, he testified as follows:

"I was general agent for defendants at Corning. We charged customers for loading and unloading freights, and for warehousing, in addition to the rates stated in the tariff of rates."

(The plaintiff's counsel put in evidence a copy of the special statute passed April 5, 1851, to change the name of the plaintiff's company, and for other purposes; which may be referred to by either party on the argument.)

The plaintiff's counsel here rested.

LEVI H. SHATTUCK was sworn as a witness for the defendant, and being examined by Mr. Dininny, testified as follows:

What is your business?

Railroad business.

In what capacity are you acting?

Superintendent of the Tioga Railroad.

How long have you been?

Since December, 1852.

Were you also superintendent of the Blossburgh and Corning Railroad?

Yes, sir.

During what time?

From December, 1852, until October, 1862, and then there was a break until the next May, I think, and then I was a joint superintendent, for Magee, in the Tioga Railroad, until some time in 1867, I think.

Where did you live during that time?

In Corning. I lived here until about the fall of 1866, when I removed to Blossburgh.

Who was here, at the time you came here, having charge of the business, as agent?

Mr. Dougherty was general agent when I came here, in 1852. He remained here until the spring of 1853. I came here, I think, in December, 1852.

Who took his place as general agent after he left?

Josiah O. Stearns.

132 How long did he continue to act as agent?

I don't recollect, but I think it was something over a year. I couldn't state.

Where did he live?

In Corning.

He died?

No, sir: but he is dead now.

Who took his place?

Amos C. Stearns, the present secretary and treasurer of the company.

What time did he come?

He came about the time his brother left, or immediately before. He succeeded him.

Has he resided here since that time?

Yes, sir.

And has continued to be general agent and secretary and treasurer down to this time?

Yes, sir.

You mean of the Tioga Company?

Yes, sir.

You were superintendent of the Blossburgh and Corning road while it was run by the Tioga road?

Yes, sir; from December.

When was the Blossburgh and Corning road divided into sections?

It was then the Corning and Blossburgh Railroad. I had it divided into three sections.

Who were your section bosses during that time?

At the expiration of the lease, John Cowley, Bernard Cowley, and John Donovan.

Where were these sections located?

Barney Cowley's section was from Corning up to a certain crossing above the gang-mills that have been referred to here. John Cowley's section commenced at that crossing and extended about six miles, near Ryers's Eddy, and Donovan's was the remaining distance to the State line.

What was the duty of those section bosses?

To take charge of the track, and see that it was kept in order, and general repairs of the track.

Were you in the habit of going over the road frequently, at the time it was surrendered to Magee?

133 I was in that habit all the time I had charge of it, and did that summer until the last month. The last month I was lying sick with the typhoid fever, and was unable to go out of the house. I rode up as far as Lawrenceville with the party who testified yesterday, but couldn't walk back with them. I rode back on the return train.

Are you acquainted with this trestle-work which has been mentioned, in Corning?

Yes, sir.

What portion of that belonged to the Blossburgh and Corning Railroad?

I don't know the length. There was nine hundred and twenty-five feet, if my recollection is right, of the lower end, belonged to the Tioga Improvement Company, as I understand it.

That formed no part of the Blossburgh and Corning Railroad?

No, sir.

It was all one continuous line of trestle-work?

Yes, sir.

Now, will you state what the condition of the trestle-work was at the time the road was surrendered—that portion that belonged to the Blossburgh and Corning Railroads?

I paid but little attention to it, with the exception of keeping it in a safe condition for trains to run over. It was built for the purpose of dumping coal, and I never understood that the company was to renew or keep up the trestle-work, more than to get their trains over it.

You didn't understand that that belonged to the railroad?

I don't know that I had any direct information with regard to it, but my impression was——

(Objected to.)

A. I regarded the structure as belonging to the coal company, and the railroad company were to put the iron on the trestle and keep it in condition. I didn't examine very carefully the condition of that trestle-work.

134 You didn't understand that that belonged to the railroad?

I wasn't informed.

Did you examine it, so as to be able to state what it would require to put it in safe condition?

I considered it safe for locomotives to run over it.

I understand you it didn't need any repairs to put it in safe condition for locomotives to run over it?

There were several hundred feet—I can't say the exact distance—that was originally built for a narrow-gauge track, and it bore the marks of having been widened, and timbers placed under the ends of the caps to the end of the sill, to support the iron after the track was widened, and between each of the old trestles there had been a new trestle placed, so that, for a portion of the distance, the work had double the number of trestles it had below.

Did you continue to use that trestle-work after the road had been surrendered and while you were superintending for Magee?

Yes, sir.

How long did you continue?

From the expiration of the lease up to May. I had nothing to do with superintending this end of the road.

I want to know how long you continued superintending for Magee, after the road was surrendered?

I wasn't superintendent of his road after the expiration of the lease, from October to May.

How long after May, were you?

I continued to 1867, I think. I wish to be understood that my superintendency for Magee had nothing to do with the track. I had charge of running the trains.

Did you continue to run the trains over that trestle-work during that time?

Yes, sir.

Did you hear the testimony of the witnesses in reference to this break-up near the gang-mills?

Yes, sir.

State what had been done prior to the surrender, and up to
135 that time, at the point where they claim to have built this wall?

The road was in a safe condition, if you wish me to answer shortly.

State about the timbers under the track.

There was a year or two, perhaps, previous to the expiration of this lease—in more than one instance during that time, heavy rains that washed away—there was, for a distance, a retaining wall. Perhaps the base of the wall might have been half way from the top of the bank to the water's edge. It was a little less than that, I think. Through this retaining wall there were openings, outlets for little ravines, and, in several instances, there were heavy rains; and, at the mouth of these culverts, the water had got behind the walls, and loosened the foundation, and it slid down, so that the wall stood in something of this shape, and it let the wall slide out; and the track was partly on this shelly rock and partly upon the earth this wall retained. In some places it slid back to the end of the ties, and in some places it cracked back as far as the centre of the track. To get the trains over, we blocked it up, and we had room enough, and we slid the track in towards the hill, to get it on a firmer foundation; and, as soon as we could get to it, we put on a gravel-train and carted gravel down from Ryers's Eddy to fill it up, and we left the track in for a certain distance. There was a portion of the timbers that reached over these culverts or ravines. The gravel was filled in on to the ties we left in. Perhaps the recollection of the men who had charge of the section would be better than mine. I think the ties were taken out, but the long timbers over the culverts were left in. They were covered over at the ends with gravel, but not where the culverts were.

Was it put in good, safe condition?

I considered it so.

136 Was it so when you left it?

Yes, sir. I think Mr. Cowley, not being foreman of that section, was a little confused as to the time. It wasn't the condition of the track at the time it was surrendered that he was undertaking to describe.

Was it better for the track that it should be moved in?

I considered it so.

Would the track have been as substantial and firm if you had moved it out again?

Not unless we built the wall as they have done since.

Do you remember up at the Mulhollen grade a trestle-work built there?

Yes, sir.

How did that come to be built, and with what kind of timber was it built?

During the freshet, within the four years previous to the expiration of the lease, it washed away.

From the water in the river?

No, sir; from the water from the Mulhollen Creek. It washed out the distance they have stated, I should think.

State what you did by way of replacing the track.

I built a trestle-work and trestled the gap over, and built abutment walls, and run it in that condition.

What was the condition of that trestle-work when it was surrendered?

It was safe. It was good pine timber, and had run four years. I think pine timber, if it is good, is safe for twelve years. That is the ordinary life of that timber in an exposed trestle-work.

You heard the witnesses testify something about the timbers, at the creek-crossing above that, being unsound. Do you remember anything about those?

I do.

What was the condition of those timbers at the time of the surrender of the road?

A portion of them were pine and a portion of them were oak. The timber across the creek at Erwin Center referred to, was oak
137 timber, if I recollect correctly, and in good condition. I think that one or both (I am not positive about both) were renewed with oak. I think both were renewed. I think the same timbers are in still. I know that they were in for more than a year after the road was surrendered, and none removed.

You heard the witnesses testify in reference to the culvert at Erwin Center. What was the condition of that at the surrender of the road?

One wall on one side of the culvert, on the north side, the bottom of it had slid in, so that it was quite narrow at the bottom of the culvert, and stood slanting. The other was standing.

What was the condition of it when you came on the road?

In that same condition.

It remained in the same condition during the whole ten years?

Yes, sir. I haven't seen any change in it, except that several years ago a freshet washed out some of the bottom stones, and they were replaced in the same condition. I think I made the remark to Gorton about its standing better then it was anticipated.

The wall never has been taken down?

Not to my knowledge. I have noticed it a great many times during the last four or five years.

What would it cost to take *it* down that wall and replace it?

I couldn't tell without going and measuring.

Give us your judgment of it.

With the same kind of stone, I would estimate it, from my recollection of the size of the wall, at one hundred dollars. Many of the small stones would have to be thrown away and others replaced.

What was the condition of that road, with the ties and iron, and superstructures generally, when it was surrendered?

It was in a good condition, under the circumstances.
138 What do you mean by that?

I purposed to leave it, and did leave it, in a good condition for a road built for the purposes for which it was built. For that purpose it was in good condition.

Did it need the replacing of any more ties than the ordinary repairs of a railroad in good condition would need?

When I came here the road had just been relaid with new iron and new ties, and for several years it needed very little renewal, and needed but very little up to the expiration of the lease, except the renewal of the ties. I renewed them, and kept the road in better than ordinary order. I furnished ties to replace them as fast as they gave out, with instructions to the men to put them in.

Were they put in as fast as needed?

I think they were.

Was there any necessity for replacing any more ties in the road in that time than you put in?

I don't so consider it. We commenced in the spring to put n ties, and continued during the summer, as they became decayed and unsafe. I don't say that the road compared with the Erie road, with the motive-power of the Erie road, or was in as good condition as that, any more than I would say that a bridge in good condition for a one-horse wagon would be in good condition for a locomotive.

Do you mean by that to say it was in any worse condition than the Erie road?

No, sir. It was in good condition for the business it was to do, and with the motive-power used on it.

How was it about iron?

It was in the same condition. We had just commenced renewing. The ten years had just expired. Our business had been very light, and consequently the iron had not needed renewing until the last year or two.

139 What was the business of that road in that ten years as compared with the business now?

During the ten years there were eight hundred and thirty-three (objected to) eight hundred and thirty-three thousand three hundred and fifty-eight tons of coal transported in the ten years reaching into October; 374,593 tons of lumber were transported. I estimated it at 2,500 to the thousand. There were 37,332 tons of miscellaneous merchandise. This made, in the aggregate, 1,245,283 tons for ten years' business, aside from the passenger business.

What is the present business?

The coal business will amount to about six hundred thousand tons this year. I have made no estimates about the lumber. I could state somewhere near that. The tonnage is almost three times the amount of those ten years.

Was the iron in condition, upon that road, to be safe for the passage of trains over it?

I think so. I have had no accidents from defective iron or ties. There never has been, to my knowledge.

Question by Mr. Reynolds: Or defective fences or ditches?

No, sir; our accidents have been from smashes of a different kind.

Mr. Dininny, resuming: State the condition of the ditches during that time.

They were not as deep and wide as the ditches on the Erie road. We made a practice of cleaning them every year. There might have been a time, in rains, when gravel and dirt washed down into them; but we cleaned them out as soon we could. I can't say that in the month preceding the expiration of the lease there was no gravel in the ditches.

Would there have been likely to have been in that month much filling up of the ditches?

I couldn't say. The rain might fill them very soon.

140 How were they at the time you were taken sick?

I don't recollect now of anything unusual.

Were they in good repair and suitable for the road?

I think so.

In reference to the brush upon that road, state what there was about it.

I think there was brush enough along the line of the road.

Was there any there that needed to be cut, in order to run the road safely or to put it in good condition?

I gave the men orders to allow no brush to interfere with the passage of trains; no limbs to touch the cars as they passed. I didn't understand it to be my business to clean the brush away from the track, except such as was in the way of the passage of the cars. I have cut brush to put into the river banks for ripraps.

Is it necessary or proper for the brush to be cut on the river bank below the track?

I gave orders to have none of it cut. I considered it a protection to the bank, to keep it from sliding.

Was that the case above the track?

There were some localities where the dirt had a tendency to slide.

Were these brush so high as to shade the track, or was it shaded by the mountains and trees above them?

There were portions above Mulhollen that the track would have been shaded by the trees. There were places, also, where the brush shaded the track.

What was the dlstance where it was shaded by the brush?

I can't tell. I didn't consider it a part of my business to cut brush.

Did you consider it necessary to cut that brush, in order to keep the road in good repair?

I cut all I considered necessary to protect the road or the trains. I didn't know where the line was, or whether the road was three or four rods wide.

Can a road be kept in good line and surface with one-third of the track rotten and decayed?

A tie will commence to decay on the outside.

141 I mean when the tie affords no protection to the track?

I think it would be impossible to run the road.

What was the line and surface of your road, prior to the time of the surrender of it, and at that time? Could the road be kept in good line and surface, with one-fourth of the ties so rotten and decayed as to require immediate removal, taking them as ties are ordinarily distributed over the track?

If they were equally distributed, I mightgo and put one-fourth of them them rotten, not entirely, but so they ought to come out immediately, it might then be possible to.

I mean as they ordinarily decay?

It would be difficult to do it.

Did you find any difficulty in keeping the road in good line and surface, on account of the ties being so defective?

I did not.

Q. By the referee: Have you any means of knowing how many ties needed replacing at that time?

Yes, sir; I have means of knowing how many we were putting in.

At the time the road was surrendered, can you state, from positive knowledge, as to the number of ties that needed immediate replacing?

I furnished the ties, and calculated to put them in. There were ties that were in all stages of decay, but I don't consider that the ties that were so far decayed as to be under the necessity of immediate taking out, was but very few, to put the road in good condition. I didn't go over the road to examine it the last month.

Mr. Dininny, resuming: About how many should you think?

I didn't intend to have any. I furnished the ties, and instructed the men to put them in, to keep the road in good, safe condition.

As long as you passed over it, did they comply with your orders?

In general, they did.

142 Q. By the referee: Do you know the number of ties you put in that year?

I only know from the statement of my section-men. I gave them orders yearly to report the number of ties they had put in in the year.

How many were there?

On the lower section, from May up to the expiration of the lease, I think the number were seventeen hundred and twenty; and Cowley testified last night, in reference to the middle section, and there will be testimony furnished in reference to the other.

Mr. Dininny resuming: How long was the section on the lower end?

It reached from Corning to above the gang-mills four or five miles.

How many were put in that?

Seventeen hundred and twenty. I think that is the statement on the book.

Was there anything charged by the company for the carriage of freight, discriminating in short distances, for motive-power other than was in the tariff of rates?

Not for motive-power.

During the entire time of this lease, and subsequently, down to this time, have the cars and locomotives of the Tioga Railroad been run to Corning?

From October, at the expiration of the lease, to the next May, the locomotives were changed at Lawrenceville, but the cars came to Corning.

With the exception of this break in the time, the locomotives and cars have run daily from Blossburgh to Corning?

Yes, sir; except when the freshets have torn away the banks.

Did the Tioga Railroad have an office here?

Yes, sir.

Did Dougherty act as agent here?

There has been a general agent ever since I have been here. There has been here one constantly, to this time.

143 Amos Stearns is a director and secretary of the company now?

Yes, sir.

Dougherty was a director of the company when he resided here?

Yes, sir.

Wasn't he secretary also?

I think not.

He was treasurer all the time?

I can't say. He was a director while he lived here.

Being cross-examined by Mr. Faulkner, he testified as follows:

You say you went over this road frequently, was this for the purpose of superintending the work of the section-bosses?

Yes, sir.

What do you mean by frequently?

I rode over the road four or five times a week, and my practice was to walk over it and examine the section at a time. I examined the whole road by walking over it, I think, oftener than once a month. My best recollection is that I was on portions of the road.

How often did you examine the entire line, by walking over it?

I should say twice a month, over the whole road, according to the best of my recollection.

You were first superintendent of track and of running the train?

Yes, sir.

And do you say you didn't know whether the trestle-work belonged to the coal company or to the railroad company?

I understand that the trestle-work belonged to the coal company. I didn't know, and never asked the question.

You didn't know whether that belonged to you to see to?

It did, to see that they were safe for the locomotives to pass over them. I didn't understand that that was a portion of the duty of the Tioga Company to leave the trestle-work in any particular condition. If it was safe for our locomotives, that was all my duty.

144 You understood that, if it belonged to the Blossburgh Company, it was contained in the track?

Yes, sir; but I never ascertained that. I understood, when I came here, that the track and trestle-work was for the Tioga Improvement Company, and not a part of the railroad, I supposed.

You say that at the gang-mile wall the track was safe?

Yes, sir.

There was a stone wall there in the first place?

Yes, sir.

And that wall slid out so as to make a mouth to it?

Yes, sir.

And carried out the dirt with it?

Yes, sir.

And that wall never was replaced by the defendant afterwards?

Not in that same shape.

You filled it in with dirt?

With dirt and stone.

Did you lay up a wall?

Yes, sir; what I call a riprap wall.

How is that?

By stone laid in *this* way.

You replaced it by a dirt wall that left a crack to the centre of the track?

No, sir. The action of the water washed it out, and I put on a gravel-train to haul gravel to take the place of the dirt washed out.

Did you ever place it so that the track was of its original width?

I won't say whether I did. It was nearly so.

Did you know whether you did or not?

No, sir.

When you got through, did the ties project over the edge of the bank?

Only at the culverts.

When the water had washed out the bank and the wall, and you replaced it with dirt, do you say it was safe?

The water didn't force the wall out, but the water undermined the foundations of it, and let it slip down, and a portion of the dirt slipped down with it. I had the stone in this shape, at the bottom,

145 as a retaining-wall, instead of digging down, because I considered it safer. I consider a riprap wall safer than a wall built nearer the perpendicular.

Where these timbers you put under the ties lying horizontally?

Yes, sir.

Did one stick support several, or how were they placed?

Where they were washed out so that it was necessary for temporary protection to place a stick horizontally, we placed a shore under the ties with a temporary protection to hold them up to the ties.

You say the bank was washed out on the Mulhollen grades and trestle-work substituted. Wasn't that liable to wash out?

No, sir; I think not.

The water did carry out the dirt-bank.

Yes, sir.

You substitute' a trestle-work.

Yes, sir; and instead of an 18-inch culvert, we had an opening of one or two hundred feet.

What did you do to protect the base of your trestle-work from washing?

Only digging down to a solid foundation.

What was that foundation?

Digging down to the gravel and out of the muck and mud. There were abutment-walls put at each end.

At Erwin Centre you say the culvert had been undermined so that one side had slipped in?

I don't know.

One side of the culvert had slipped in and the passage was narrow?

Yes, sir; at the bottom.

I understand you to say that you regarded that as safe?

Yes, sir.

Did you regard the original aperture as necessary?

I think there was sufficient aperture for the water still.

Do you think it was needlessly large?

I think it was full large.

You only began to make repairs near the close of the lease of this road. What do you mean by that?

146 I mean that the road when received just relaid with new iron and ties. I said renewals. It didn't require renewals until towards the close. I commenced putting in new ties, more or less, for five years before, and increased the number from time to time as they were needed. There was little iron renewed.

Can you give any statement as to the amount of ties and iron that were renewed?

I couldn't without referring to the books.

You said the ties were in all stages of decay.

Yes, sir. I mean from the first softening of the timber up to when I considered them necessary to come out.

You mean some of them were very rotten?

Not as rotten as they might have been.

They were utterly useless?

They had instructions, and I understand——

Were they worthless?

I can't swear, as to any positive knowledge, as to how many of those ties were rendered utterly worthless in the last month.

Do you know how many of the ties had been renewed?

I don't know.

About what proportion?

I never made any calculation, only to replace them as fast as necessary.

What were the original ties?

Oak and chestnut. There might have been some few ash.

The lease ran ten years?

Yes, sir.

You didn't begin to make repairs for five years?

No, sir. I said renewals, not repairs.

When did you first renew the iron?

There may have been occasionally a bar put in for four or five years.

Were the bars you put in new?

Some were new and some not. We didn't put in much. We only purchased a hundred tons of iron—that we purchased for the forty-one miles of road—up to the expiration of the lease.

147 Did you put in a dozen new bars?

I think so. There was a point at Lindley that there was from twelve to twenty bars of new iron put in.

Where did you get the old iron that you put in?

The old bars were partially worn. I got them up near Tioga.

Did you take any off the side-tracks to put on the main track?

Yes, sir. In one instance we were wanting some 18-foot rails on the main line between here and Lawrenceville, and there were some 18-foot rails on these bridges down here, and I put in iron we took out of the main line and took the better iron to put in the main track.

Where did you put it?

Between here and Lawrenceville.

How did you replace it in the side-track?

With the iron taken out of the main line.

Did you take any old iron from the other road to put in this?

With the exception of the fifteen or twenty bars of the hundred tons of iron we purchased for renewals, the rest of it was laid in the track at Tioga. It was of a different length from the original iron. There was a few bars of that iron put in at Lindley—new iron, shorter bars—and the balance was put in at Tioga, in a continuous string from Tioga towards Blossburgh; and the iron that was taken out was carried all along the road to patch up with. We used what was in good condition to patch up with.

This road was relaid with cross-ties and T-rails for the purpose of performing the contract?

Yes, sir; with T rails or H-rails.

Do you know whether they relaid the Tioga road at the same time?

Yes, sir.

Were the hundred tons all used?

Yes, sir; it was all put into the track.

148 How much of it was put into the Blossburgh and Corning road?

From twelve to twenty bars, and the balance in the Tioga Road at Blossburgh.

You cut brush along the road only for the purpose of protecting the river-bank from washing?

Yes, sir.

Where did you put it?

A portion of it at Ryers's Eddy.

Where was the rest?

At different places.

What was the size of it?

From the size of a whip-stock to the size of a man's ancle.

How did you lay it?

On the river-bank, where the water from the river washed it out, or where the creeks washed out. I laid it in with the tops up-stream into the banks, with the buts reaching out into the river; and I piled stone upon it to prevent the water washing into the bank.

Did you do any of that work where this wall went out—where you put the riprap-wall?

I don't think I did.

Is that way of laying brush called riprapping?

Yes, sir.

You say you were sick at the time this examination was made, and that you rode over to Blossburgh and rode back?

I went to Lawrenceville.

Who went with you?

These gentlemen who have testified, and Mr. Rumsey.

Anybody else?

I don't know but the car was full of passengers.

Were there any others who went along for this purpose?

I think there was two that the Tioga Company had.

Who were they?

Livingston and Emery.

Q. By Mr. Rumsey: Didn't we take an axe?

I don't remember it.

149 Being re-examined by Mr. Dininny, he testified as follows:

You put in a shore to raise the cross-timbers on, in propping up the ties?

Yes, sir.

That was subsequently all removed, and filled with earth, before the road was surrendered?

I don't remember. It was all filled up solid, though.

The trestle-work at the Mulhollen grade, how was that embankment carried out?

There was originally a culvert with an opening of eighteen inches, or a foot, and the water came from the creek, and the opening was not sufficient to carry the water away, and it worked in and carried it away, and I built the trestle-work. I left more opening than was necessary, but I meant to have enough.

Was the riprap-wall a better protection to the bank than a perpendicular wall?

I think so.

This trestle-work was built in the ordinary way of trestle-work crossing streams?

Yes, sir.

It answered the purpose?

Yes, sir.

Speaking of the iron in the track, you took up some iron at Tioga, and put in new iron; is it the practice of railroad men to put new iron in a continuous string?

Yes, sir.

Was the iron you took up and used in other places in good condition?

Yes, sir.

You only put into the track such iron as was in good condition to use?

Except where I made the change. There was some of the iron taken out from the side-track, and I put iron in there that wasn't fit for the main track. There might have been forty or fifty bars.

State whether you know whether any of the iron is in the Blossburgh and Corning track that was in when the road was surrendered?

Yes, sir. About six miles of the original old iron is still in the track.

150 Is there, besides that, a large portion of the original iron still in the side-tracks?

I think the majority of the iron in the side-tracks is what has been taken from the main line.

They have continued to take it out from the main line and put it in the side-tracks?

Yes, sir; and the iron that is not considered safe or economical to keep in the main line. I don't know in reference to the side-track in the village.

Q. By the referee: Is there any reason for making this new strip of track on the Tioga road, instead of the Corning and Blossburg road?

I don't know of any reason. I selected a place in the road where the iron was of different lengths. If the 20-foot iron was giving out, and I needed that to repair any other portion, I took it out.

You might have made the change on other parts of the road?

Yes, sir. I don't recollect anything in the condition of the road that made it necessary to put it upon either road, in particular.

Being again cross-examined by Mr. Faulkner, he testified as follows:

As to the relative amounts of business, what is the greater amount on the two roads?

On the Blossburgh and Corning road.

How is the passenger traffic?

It is about the same.

Was there any difficulty in making a throat large enough through a culvert up there?

No, sir.

The old culvert still remains there?

I don't know. I presume it has been rebuilt. It could have been put in with a throat large enough to let out the water.

Did you mean to say the original culvert washed out?

Yes, sir.

Isn't the culvert still there?

It is possible. I may be mistaken.

151 The throat of the culvert was not large enough to discharge the water, but it ran over, and around, and the culvert is still there?

I can't say. I think I was mistaken about that. I think the facts were these: The culvert not being large enough, the water overflowed and left the culvert there.

Is trestle-work less expensive than a culvert and bank would be?

Yes, sir.

About what would be the proportion?

That I couldn't tell without an estimation.

Would it be as much a third of the cost to put in a trestle-work.

I think it would there, with the retaining-walls.

BERNARD COWLEY was sworn as a witness for the defendant, and being examined by Mr. Dininny, testified as follows:

Where do you reside?

Five miles from this village.

What is your business?

Farming.

What was it, years ago, in 1862, for instance?

Railroading.

Where were you engaged in that?

From this village up about three and a half miles.

You had charge of a section as section-boss?

Yes, sir.

Under whom?

Under Shattuck, part of the time, and a little over a year with Mr. Magee.

Do you recollect that opposite the gang-mills there was a slide from under the ends of the ties?

Yes, sir.

It was propped up temporarily?

Yes, sir.

What was the condition of that at the time the railroad was surrendered to Magee?

It was all leveled up, with gravel and stones, and you wouldn't have known that there *was* any timbers there.

Had a gravel-train been employed to fill it up?

Yes, sir; and we moved the track over to the hill, and we filled it up, and threw out some of the timbers.

152 Were there any timbers left in, except across the culverts?

No, sir. Where it washed off, there was a long timber, sixteen feet long, supporting the ties and culverts. There *was* no timbers left in, except at the culverts.

Was the tracks in good condition when it was surrendered to Magee?

Yes, sir.

Was it safe?

Yes, sir. It was safe.

You had charge of the section; what was your duty, in respect to replacing ties and iron?

To keep all the bad places fixed.

Did you replace ties and iron as it was needed?

Yes, sir.

Was it always furnished to you when you called for it?

Part of the time I hadn't iron enough to take out all the bad ones. Some of them had worn spots. The last part of the year there was a rail I objected to because it was worn off with the flange of the wheel.

Was it in a safe condition to run over when Magee took the road?

It could be kept safe by spiking it.

How were the ties when it was surrendered to Magee?

There was ties enough only on the side-tracks, and the Tioga Company run down on the trestle-work and came on the side-track. On the main track there was ties enough to keep it good.

How many ties did you put in the year preceding the time the road was surrendered to Magee?

I put in, the year before, I don't know. I have some ties on my books. I suppose I put in from seventeen to eighteen hundred.

You continued on the track after Magee took possession of the road?

Yes, sir.

How many did you replace the first year Magee took possession of it?

I suppose I placed about twelve hundred in.

153 You put in five or six hundred less than you had the year before?

I wasn't altogether on the track. I was working around in different places.

You had charge of this section?

Only about a year.

You think you put in about twelve hundred in this section the year after Magee took the road?

Yes, sir.

State whether after you took charge of this section under Shattuck the ties were increased on the curves considerably.

Yes, sir. There was quite a number of small ties that didn't fill up the

space enough, and I put them closer together, in places. I went over the road and put in new ties between old ties in some places.

Were the first ties small or large?

Some were laid with eight-inch face and some with four.

How did they compare with the ties put in by Shattuck's directions?

The hemlock ties were a great deal larger. All we found fault with they were too deep. Then they were got of a regular thickness, no matter how wide the face was.

Being cross-examined by Mr. Rumsey, he testified as follows:

When did you first begin to replace the ties on that road?

I don't know. It was very shortly after I commenced. In the last four or five years they began to fail pretty fast.

What proportion of the old ties did you leave in there when Magee took the road? Had you removed a quarter of them?

Yes, sir; I guess over half in my section.

They had been laid ten years?

Yes, sir, what hadn't been removed.

You speak of putting in other ties on the curve?

Yes, sir.

154 For the purpose of getting more purchase, so as to hold the rail?

Yes, sir.

There were no hemlock ties put in at first?

No, sir.

You put in the first hemlocks that were put in?

Yes, sir.

A bearing-surface of four inches would have been enough if the timber was hard?

Yes, sir, if it was larger under.

Do you remember whether you covered up any of the ties that were put under the track at the gang-mill?

At the timbers we dug off at their ends for about three feet, and going up near where the water washed off the dirt I stuffed in old ties.

And those you left in there and covered up?

Yes, sir.

About how many of those did you cover up?

Not over six.

Were there any short ties put in there to hold the track up except these?

No, sir; only on the culverts.

About how far was the track moved in?

I think it was moved about four feet.

For how long a space was it moved four feet?

About fifteen rods; in that spot at the gang-mills.

That bank was never replaced, so as to be of the original width?

The edge of the bank never went away. The trouble was that the edge of it wasn't high enough to heap stuff on it. The brush is there to-*day* that was there then.

State whether the bank didn't slide down so as to leave the ends of the ties without any support.

No, sir. The dirt wasn't high enough to hold up the ties. It never slipped all away.

It went down, so that the tie wasn't supported by the bank?

Yes, sir.

155 The bank settled by reason of the wall below settling or going out?

Yes, sir.
When it got wet it would settle and slide?
Yes, sir.
And there is when you built it up?
Yes, sir; at the culvert.
How long a space did you support the track with those ties?
That stick was fifteen or twenty feet long.
You didn't put any dirt out to the edge of the old bank?
I did.
Do you mean to say that that bank is now filled up, or was filled up as high as it was originally, on the spot from which you moved the track in to the hill?
It is now; it wasn't when I left it.
Gorton filled it out as far as it was originally?
Yes, sir.
There was another place besides that where that track went out?
Yes, sir; near McBurney's mill. I moved it there about fifteen rods.
How wide?
From three to two feet.
Why did you move it in?
The timbers rotted, and went down with the water.
Did you fix up the docking then?
We got stone and brush in there.
Did you fix it as wide as it was originally?
Yes, sir. We didn't put the bank back, but we put it so we had as much bank outside as we had before we moved the track.
You recollect the trestle-work on the Mulhollen grade?
Yes, sir.
It didn't go away by washing out the culvert?
No, sir; that is there now.
How far from the trestle-work is the culvert?
Maybe two or three rods.
From forty to sixty feet?
Yes, sir.
That culvert wasn't ditched at all?
The water passed around it.
156 You put the trestle-work there to supply the place of it?
I didn't do it.
There is a curve along by Mulhollen's grade?
Yes, sir; at the head of the grade. It is a pretty sharp curve.
Had the iron upon that curve ever been replaced when you left there?
No, sir. It was repaired by Magee.
How much was that worn?
One bar was worn until it was about an inch wide. I objected to the iron on that curve, to Mr. Rogers.
That wasn't very safe?
It had to be watched all the time. It was pretty well worn.
There is a good deal of strain by the passage of a train on such a curve?
Yes, sir. They never got off there.
How long had that been in bad condition?
I hadn't been there until Rogers put me there.
You know they took a large quantity of iron up on the Tioga road?
Yes, sir. I think they took up some.
None of it was stopped by the Mulhollen grade?
No, sir.

Was there any left along this side of Lawrenceville?

I put in four bars up there in the crossing by the Mulhollen grade.

Being re-examined by Mr. Dininny, he testified as follows:

Was the pressure on this bar any more than there would have been on new bars?

Yes, sir. The flatter the face of the bar is the worse the flange of what is on it.

How long before you were put on that section?

I was put there in about two months. I believe I went on and repaired the curve, and put double ties in it.

157 How long *was* you on that section?

About seven months.

And the old iron was still there?

Yes, sir.

You speak of the moving in of this track; was the track better or worse by moving it in?

I reckon it was better. What kept it up was the docking, and that was carried away, and stone and brush *was* put there.

You speak of the place near McBurney's mill?

That is what I am talking about.

You moved it at the gang-mill?

Yes, sir.

Was the track better or worse by being moved there?

It was better than to have it where it was, unless there was a wall built from the river up to it.

Was it necessary to move it back in order to put the track in good order?

It was then, because it had gone down.

It was better to have it there than to move it out again?

Yes, sir; because in moving it you got it more on the rock.

After Magee took the road he built a wall outside?

Yes, sir.

Outside of the old wall?

Yes, sir. He built it to the old wall, and leveled to the old wall.

At the McBurney mill, how did you replace that embankment?

The track was moved back to the hill, and Shattuck got stone at the steam-mill, and got brush and put it there.

Did he make a permanent bank?

Yes, sir.

Is it as permanent, or more than it was before?

Yes, sir. It wouldn't rot, of course.

Being again cross-examined by Mr, Rumsey, he testified as follows:

Magee gave up the road in the fall?

Yes, sir.

158 There is but little heavy business on that road in the winter?

No, sir.

There wasn't a quarter of the business in the winter as in the summer?

No, sir; there wasn't then.

COFFIN COLKET was sworn as a witness for the defendant, and being examined by Mr. Reynolds, testified as follows:

Where do you reside?

In Philadelphia.

Have you been connected with railroads for any length of time?

I went on the Baltimore road in 1829.

Were you connected with the Tioga road at any time?

I came here in 1839.

Were you connected with the Tioga Railroad Company when the contract was made which is the subject of this action?

I was one of the men who signed it.

Were you present at the negotiations and settlement of the details of the contract?

Yes, sir.

A part of it reads in this way: "The Tioga Railroad Company agrees to pay to the Corning and Blossburgh Railroad Company two-thirds of the receipts for passengers, mails, and freights which shall be taken for said Corning and Blossburgh Railroad, the expenses charged customers for the loading and unload coal, lumber, and other freights, and for warehousing and such additional charges, by way of discrimination, as shall be made for short distances for motive power, not to be included in the term 'receipts' as above mentioned."

I wish to ask you whether the words "such additional charges, by way of discrimination, as shall be made for short distances for motive power," has anything to do with anything except railroad transit?

(To this question the plaintiff's counsel objected, upon the grounds:

1. That no evidence could be given to explain or vary the terms
159 of the contract; 2. That it was not competent, and 3. That Mr. Magee and Mr. Bostwick, who were the other parties to the contract, were dead.)

State whether these words in this contract, "charges by way of discrimination, as shall be made for short distances for motive power," have any application, except in reference to railroad transportation.

(To this question the plaintiff's counsel objected, upon the same grounds. The objection was sustained, and the evidence excluded, to which ruling the defendant's counsel duly excepted.)

Has that language any signification whatever?

It has a meaning.

(To this evidence the plaintiff's counsel objected. The objection was sustained, and the evidence excluded, and the defendant's counsel duly excepted.)

Has it any meaning or signification whatever, except applied to the circumstances under which this contract was made?

I think not.

(To this evidence the plaintiff's counsel objected. The referee sustained the objection, and excluded the evidence, to which the defendant's counsel duly excepted.)

Has this phrase "discrimination," on account "of motive power for short distances," any different meaning when applied to railroad transportation, than when applied to ordinary transactions? Any meaning different from its ordinary and popular signification?

(To this question the plaintiff's counsel objected. The objection was overruled, and the evidence received, to which ruling the plaintiff's counsel duly excepted.)

A. I don't see how it could apply to anything else than the place it is put in there, for motive power.

Has it any application to the ordinary transactions of mankind?

No, sir.

160 Is is not a phrase that is peculiarly applied to the transactions of railroads?

(To this question the plaintiff's counsel objected. The referee sus-

tained the objection, and excluded the evidence, and the defendant's counsel duly excepted.

Does the phrase "discrimination for motive power for short distances" have any meaning or signification in railroad matters, different from its ordinary or common signification, without referring to railroad matters?

(To this question the plaintiff's counsel objected. The objection was overruled, and the evidence received, to which the plaintiff's counsel duly excepted.)

A. I don't see how it could apply to other parts of railroad business. It might be applied, by other persons who understand it better than I do. It applies to this contract clearly, as I understand it. That was very clearly a portion of the contract.

(The defendant's counsel offered to show: That at the time this agreement was made, the subject of the "discrimination on account of motive powers" was discussed and well understood by both parties to the agreement.

That the phrase "charges, by way of discrimination, on account of motive power on account of short distances," in the contract, was intended and understood to give to the defendant the benefit of that discrimination.

That the provision in the contract, providing that a tariff of rates should be settled and agreed upon every year, by both parties, during the continuance of the contract, was also intended and understood for the benefit of both parties.

That the tariff of rates made and introduced in evidence, embraced the discrimination on account of motive power for short distances
161 intended to be embraced in the words of the contract, and was assented to by both parties, and that during the existence of the entire contract the road was operated by the defendant under that tariff, which embraced this discrimination, made by the consent of both parties, intended for the benefit of the defendant; and

That no other discrimination was ever made, or ever intended to be made by either party.

The plaintiff's counsel objected to the admission of the proposed evidence.

The objection was sustained by the referee, and the evidence was excluded; to which ruling the defendant's counsel duly excepted.

The defendant's counsel also proposed to prove that the discriminations that were make in the tariff of rates, by consent of both parties, were intended for the benefit of the defendant, on account of its motive power, and to answer that provision in the contract, as a fact after the contract was made; and that, when the rates were so established, these discriminations were made in the tariff for the benefit of the defendant, and to answer that provision in the contract.

The plaintiff's counsel objected to proof under the offer, which objection was sustained by the referee, and the defendant's counsel duly excepted.

The defendant's counsel also offered to prove that the discrimination and extra charges, made in the tariff of rates for short distances, were made for, and on account of, motive power, for the benefit of the defendant.

To this offer, the plaintiff's counsel objected, first, as incompetent; and secondly, that the defendant's counsel did not propose to prove the proposition by written evidence.

The objection was sustained, and the evidence excluded, and the defendant's counsel duly excepted.)

162 JOHN H. LIVINGSTON was sworn as a witness for the defendant, and being examined by Mr. Diniuny, testified as follows:

Where do you reside?

I reside at Hunter's Point, opposite Thirty-fourth street, New York.

What is your business?

I am in the lumber business.

What has it been heretofore?

Civil engineering.

Up to what time was it civil engineering?

It is four years since I have done any of that.

Have you ever been over the Blossburgh and Corning Railroad?

Yes, sir. I went over it the same day Mr. Rumsey and other gentlemen did, in 1862.

At the same time Mr. Pratt and Mr. Rumsey were along?

Yes, sir.

Did you examine the iron, and ties, and road-bed, &c., so as to be able to speak of its condition?

I made a general examination.

Had you been engaged in repairs of track upon any road?

I had on the Long Island road. I had been engaged in the construction of roads for several years.

What was the condition of that road when you went over it?

It was in very good condition.

In good condition for running trains over it safely?

Yes, sir.

Did you notice the ties, particularly?

Yes, sir, we looked at them.

Were there any more ties necessary to be replaced in that road than are commonly required in any road, kept in good repair from day to day, from week to week, or from month to month?

To this question the plaintiff's counsel objected, as leading, and as a mere question of comparison.

A. I should say it was.

I ask you whether any more ties needed replacing than on any road ordinarily?

I didn't see any ties that I thought rendered the road dangerous,
163 for the time being, and they never would, if they didn't rot away more. There were more or less defective ties.

How was the iron?

In was somewhat worn. It was in good condition for the traffic they were doing.

Did you notice the ditches along the road?

Yes, sir. They are ordinary ditches, such as you would find on most roads.

Sufficient for the purposes of the road?

Yes, sir.

What was the situation of the line and surface of the road?

They were as good as any I ever saw on any road; remarkably so.

Could you, with a great proportion of the ties rotten and defective, keep the road in such good line and surface?

No, sir; I don't think I could. You must have something to hold, or the road wouldn't stay there.

Did you examine the bridges across the creeks?

Nothing particular. I walked over them slowly, and examined them in that way. I didn't go under them. They were apparently in a safe condition.

Being cross-examined by Mr. Rumsey he testified as follows:

Your experience has been on the Long Island road?

It has been on several roads.

You only had care of the track there?

Only there.

That road runs over flat, sandy land?

I don't know as much about that as did on the new road.

When was that built?

I went there in 1860.

That is not on any hill-side, and there are no mountain streams to interfere with it?

No, sir.

Such a road requires less ties than one over a mountainous country?

I don't know as it does. The iron on the Long Island was only fifty, and this was fifty-six.

It requires no more ties, on such a road as this, than on that in Long Island?

I don't think it does.

164 Who else was with you?

Mr. Emery.

Do you recollect counting any ties?

He counted ties. I didn't.

You know they were counted by others of the party?

I didn't, until I heard the evidence.

Did you count any of the iron that was defective?

No, sir; Emery did.

How long do oak ties, placed in a road, last, upon soil similar to that?

I have seen oak ties on this road that have been there ten years.

How long do they ordinarily last before they required relaying?

I couldn't tell you.

How long do they last on the Long Island road?

They use chestnut ties. They begin to take them up after about five years.

They last longer than oak?

No, sir; not so long.

Had you any instrument to test them with?

No, sir.

Do you know whether there was an axe in the party?

I don't know. My impression is, since you have been talking about it, that there was. I never should have thought of it, unless I had heard it talked of.

How long do hemlock ties last?

About four years ordinarily. They last least of any ties they put in.

The same quality of wood varies in the time it lasts?

Yes, sir.

Did you notice any ties in that road such as were not fit to be in any road?

I noticed some that ought to have been taken out in the course of time.

Were there any that ought to have been taken out at once?

I don't know that I could say that any of them ought to have been taken out at once. There were some that should have been taken out before winter came.

You didn't notice them particularly, except to notice the average of the ties?

No, sir.

165 Did you make any examination of the iron?

Only walking over it.

Did you look at the under side of the iron in the chairs?

No, sir.

Did you notice any new iron in the road?

No, sir.

How long does the iron last?

It depends upon the wear, and the kind of iron.

You speak of the road being in a safe condition for its traffic; do you mean to say there is no rate of speed that it is not safe for?

No, sir.

You could have run with any rate of speed that is used on any road?

Yes, sir, except on the bridges. You might have run heavy locomotives, and it wouldn't have crushed the track out, or broken the bridges down.

Was that railroad in good repair for any kind of imaginable traffic, or for any engines that could be used on it?

I think so.

Question by Mr. Dininny. You made the same examination that any of the party did?

We had the same time.

You employed yourself in examining about the same as they did?

Yes.

Mr. Rumsey, resuming. You went at the request of the Tioga Railroad Company?

Yes, sir.

Do you know whether they obtained any new iron after this road was laid?

Yes, sir.

How much did they obtain?

He was telling me about taking up so many bars and laying longer iron, and taking the other iron to patch up along, when they wanted that length. It was taken out because he wanted the short length to use elsewhere.

This new iron was all on the Tioga road?

Yes, sir.

Do you know of any iron being put upon the Blossburgh road?

No, sir.

166 When was this new iron put there?

It must have when I was located on that little branch. I think it was a year before we were there. I walked the whole length of the road with Shattuck, just before the lease expired. That is the time he called my attention to the new iron.

JOHN R. EMERY was sworn as a witness for the defendant, and being examined by Mr. Dininny, testified as follows:

Where do you reside?

In Summerville, N. J.

What is your business?

On the New Jersey Central Railroad.

How long have you been so engaged?

Sixteen years.

What particular branch of railroading were you in?

I was engaged on a section, as section boss, for a year, on half the road.

Did you have charge of the track?
Yes, sir.
What length of the track?
Thirty miles.
Do you know the Blossburgh and Corning Railroad?
Yes, sir.
Have you been over it?
Yes, sir.
Were you over it about the time this lease expired?
I was there in October, 1862.
Did you go over it with a view to determine its condition?
Yes, sir.
Did you examine the superstructure, ties, and iron?
My attention was confined to the ties and iron.
Did you walk over the whole distance?
Yes, sir.
Did you take an account of the ties?
I took an account of the number of ties that had been put in the previous year. That was about four to an 18-foot rail. They had been put in late in the fall, or during the year. The road was under the ordinary course of repairs, as any road would be.

167 What was the general condition of the road with reference to safety?

The line and surface was excellent. The iron was English iron, I think; apparently the same as we had on ten miles of our road.
What was the condition of the iron?
I considered it in a very fair condition.
Did any of it need repairing?
There was twenty-one rails in the distance from Lawrenceville to Corning that should have been replaced.
What would be the condition of the iron then?
It would be in good condition. That kind of iron is hard, and a little brittle on top. It will chip off on the edge, but still the surface is smooth.
Is it a good quality of iron?
Yes, sir, an excellent quality.
What was the condition of the ties?
The road indicated about that number of ties having been put in. They were regularly distributed. I considered the road like any other road in a regular course of repairs.
Was there any number of ties that should have been taken out immediately?
They would come in for repairs all the time, as in any road.
But not so many as to make the road unsafe?
I think not.
With any large number of the ties so rotten and defective as to render it necessary to remove them immediately, could you keep the line and surface as good as that was?
I think not.
Did you look at the ditches?
Yes, sir; I think they were quite sufficient for drainage. If they were filled up it would be very difficult to keep a track in line.
Did you notice the timbers upon the bridges crossing small creeks?
There was one bridge that had stringers flattened on two sides.
What was the condition of the timber?

The timber looked good. The sap showed a "date" on the sides. I think the faces were sound.

168 Being cross-examined by Mr. Rumsey, he testified as follows:

Did you make any count of the defective ties?

No, sir, only of the ties that had been put in the previous year.

You only looked at the new ones?

I thought the idea was to know the average number of ties that had been put in.

Do you pretend to say you looked to see how many of the ties needed immediate removal?

I looked at all the ties. Yes, sir.

Were there any that should have come out directly?

Yes, sir.

How many of those were there?

I couldn't tell the *the* number.

Where were they located?

At different points all along.

How many ties are there under an 18-foot rail?

I put in nine.

The balance of the ties under these 18-foot rails, could you tell how long they had been in?

No, sir.

Could you make any estimate, satisfactory to yourself, as to how long they had been in?

No, sir.

Could you tell whether they were ties that had been originally put in?

No, sir.

Did you examine any of these rails, to see what the condition of them was; where they set on the chairs?

I noticed that the bases were broken on some of them. They were very hard iron, and would break them.

Was it on the inner or outer edge?

Sometimes on one side and sometimes on the other.

What is the effect of such a break when an engine passes over it?

If the rail would slide sufficiently, it would press from the gauge.

169 And when the break was on the inner side of the rail, the weight of the engines would cause the rail to bend down? I didn't notice any of those. The breaks I noticed were from the spike-hole inside.

Was the flange upon which they rested broken off?

Yes, sir.

Where is the spike-hole?

About two inches from the end, and an inch from the edge of the chair.

Were any of them broken further in?

There might have been.

Where were these twenty-one rails you speak of?

At different points in the road.

What was the defect in them?

They were laminated at the ends.

About how long would an oak tie last, upon that soil?

I couldn't tell.

The endurance of a tie depends upon the soil somewhat?

Yes, sir.

Would they last longer upon an alluvial soil than upon a clayey soil?

Yes, sir. I think they would last six or eight years in a clayey soil.

How does a chestnut rail compare with an oak?

A white chestnut will last very near as long as an oak tie, but they don't hold as well.

JESSE LIGHTFOOT, affirmed as a witness for the defendant, and being examined by Mr. Dininny, testified as follows:

Where do you reside?

Germantown.

What is your business?

Civil engineer.

Have you been engaged in the building of railroads?

Somewhat.

Do you know where the Corning and Blossburgh Railroad is?

Yes, sir.

Have you been over it?

Yes, sir; the 20th October, 1862.

Who went over it with you?

Mr. Smith, Colket, and some others.

170 Did you examine that road with a view to determine what its condition was?

I examined the track exclusively. I have no recollection of the road-bed.

What do you mean?

The iron and ties.

Did you examine the line and surface of the road?

Yes, sir.

What was its line and surface?

I think it was very good.

What was the condition of the ties?

I haven't much recollection of it. It would depend upon some notes. I find I have noted that there should be from three to four hundred ties put in immediately, in the whole length of the road.

That is your judgment now?

I have not changed my opinion.

What was the condition of the balance of the ties?

Probably some of them required replacing the ensuing year.

That would be very natural, in a road that had been used some years?

Yes, sir.

What was the condition of the iron?

I find I have noted that twenty rails should have been replaced in the whole line.

What was the condition of those rails?

I don't recollect.

What was the general condition of the iron?

It was pretty good for a road that had been operated so long.

What was the general condition of the road for passing trains over it?

I think it was entirely safe. They were like ties in all roads. I don't think there would have been any danger in running a train thirty miles an hour over it.

You didn't examine the ditches?

I have noted that the ditches were generally open.

171 They were then in good condition?

Yes, sir; generally.

Did you examine the timbers on the bridges?

I have no recollection of it, if I did.

Being cross-examined by Mr. Faulkner, he testifies as follows:

You say that your principal object was to examine the iron and ties?
I made that the object.
You looked at the line and surface?
Yes, sir.
Did you examine the culverts?
I don't recollect it.
Do you remember anything but what you have gained from your memorandum?
No, sir.
Have you the memorandum with you?
Yes, sir.
These three or four hundred ties, were they evenly distributed over the road?
I don't recollect.
What ties were they generally?
That I don't recollect.
You don't know whether it was *was* the oak or the chestnut that were decayed?
No, sir.
Do you recollect that any of them were hemlock?
No, sir, I don't. I recollect that there were some new hemlock ties in the road.
You think that three or four hundred ties should be renewed immediately—those that were absolutely used up—and don't know how they were distributed, but still you think the road was safe to run thirty miles an hour?
Those ties were not absolutely unsafe, but should have been renewed.
You say that some of them would have had to have been renewed the next year?
Yes, sir.
There might have been a strip of this road in which soft-wood ties had been placed exclusively, and all of them might have been within one mile on the road—how do you come to the conclusion that
172 it was safe to have run thirty miles an hour?
That was my opinion, that there was no immediate danger.
What ailed these rails generally?
I have made no note of it.
You don't know whether it was a breaking of the chair, or lamination?
No, sir.

Being re-examined by Mr. Dininny, he testified as follows:

If so many of these ties had been placed consecutively along, you would have noticed it?
Yes, sir.
I understood you to say that if so many had been placed consecutively you would have noticed that fact?
I have no doubt I would.

HENRY K. SMITH was sworn as a witness for the defendant, and being examined by Mr. Dininny, testified as follows:

Where do you reside?
In Montgomery County—in Springfield, Mass.

What is your business?
A kind of amateur farmer.
What has been your business?
Railroading.
In what capacity?
I was general superintendent of the Philadelphia, Germantown and Norristown Railroad.
Did you ever go over the Blossburgh road, to determine its condition?
Yes, sir; on the 20th of October, 1862.
Who was with you?
Lightfoot, Colket, and Conley.
Did you examine the road?
I examined the iron and ties, and looked along the ditches.
What condition did you find the iron in?
In pretty good condition. There were two rails that were defective.
They should have come out that day. There were twenty rails
173 that should have come out within a month or two. I said "this year," in my notes.
Those constituted all you deemed it necessary to take out?
Then I should have let the road run until spring.
How about the ties?
There were four hundred that should have come out that year—in November and December.
What was the condition of the line and surface of the road?
They were excellent.
Could the line and surface have been retained with any considerable amount of the ties and rails needing immediate removal?
No, sir.
With the few ties and rails you have mentioned, removed and replaced, what would have been the condition of the road?
It would have been in good condition for the traffic of the road, with the locomotives of twenty-five tons.
What would you have called the condition of the road, as it was?
It was in good condition, with the exception of those two rails. There wouldn't have been any danger from the twenty, but they should have come out very soon.
Did you notice the ditches?
Not particularly.
Did you notice them enough to be able to speak of the condition of them?
No, sir.
As far as you did notice them?
They were in good order. I didn't pay much attention to the ditches.
Could the surface have been kept up, with the ditches filled up?
No, sir. The bed would have become soft, and if it lay in earth-ballast it would require a good deal of attention to keep it in line.
Did you notice the timbers in the bridges?
No, sir.
Did you notice the brush along the road?
No, sir.
Did you notice any brush along the road that was any objection, or any impediment to the road?
174 It is six years, and I don't remember. I may have noticed it, but I don't recollect about it. I made no note of it.

Being cross-examined by Mr. Rumsey, he testified as follows:

It is necessary to keep the brush off from the line of the road?

I have planted them on the road, to keep up an embankment.

They injure the track, don't they?

That is not my experience.

The effect of taking the brush away would be to let the sun in, and evaporate the moisture?

That would be the natural effect.

If the road dries, it is less liable to rot?

No, sir. I have heard it said so here, but that is not my experience.

The dryer it is, the more it rots, then?

That is my experience.

Isn't it your notion that a variation from moisture to drought would cause ties to rot?

Yes, sir.

When the water is in it, and it dries out, and becomes wet again?

Then it will rot sooner.

Now, did you count all the ties?

No, sir.

Could you tell anything about the number of the ties that were old?

No, sir; only what I counted.

You didn't have any axe along?

No, sir. I cut in the ties occasionally, with a knife.

Simply to tell what kind of wood they were?

That is all.

Do you know whether any of those rails were broken in the chair?

I don't know.

Did you look to see?

Yes, sir; but I made no note of it. I have no doubt I saw some. I don't recollect it.

A break in the chair is about as bad a break as you could have, except a break of a rail in two?

No, sir.

175 Where is the worst break in a rail?

The worst break is anywhere. If you say, "Does a little breaking of the chair injure the rail?" I say no.

Where is the worst place to break it, short of breaking it in two?

In the chair, of course. A little piece wouldn't hurt it.

If the flange is all broken out there, to the centre of the rail, the rail would be apt to move by?

No, sir, if it was spiked well. I have seen such rails, that lasted for years. I walked over the Erie road, this morning, to see, and I found forty in a mile.

Broken in the chair?

No, sir; laminated and broken.

How many were broken in the chair?

I don't know. Twenty of them should have come out in two months.

What induces you to say that?

Laminations and breaking in the chair.

You mean laminated on top?

Yes, sir.

Now, I suppose, in dry weather it makes no difference whether the ditch is full or cleaned out?

No, sir.

And if the road had been put in line directly before you had gone on to look at it, you couldn't have discovered it?

It would take, perhaps, two or three days to get out of line, and it might have got out in an hour.

You don't mean that the whole road could have got out of line in three days?

No, sir.

It isn't liable to get out of line in dry weather?

Not so much. A road of that kind would get out of line in any shower.

Q. By Mr. Dininny. How did the Erie road compare with the condition of this, when you walked over it to-day?

(Objected to.)

Q. By the referee. Taking the whole road, as you saw it, what kind of repair do you say the road was in?

It was in good running condition, and good repair, for a mud road.

176 Q. By Mr. Dininny. You mean an earth ballast?

Yes, sir.

JOSHUA CONLEY was sworn as a witness for the defendant, and being examined by Mr. Dininny, testified as follows:

Where do you reside?

In Philadelphia.

What is your business?

Well, a kind of engineer.

How long have you been in that business?

My first contract with railroads was fifteen years ago.

Did you go over this Blossburgh road?

Yes, sir; in 1862.

What for?

To examine the condition of the road. They had taken the track and iron, and I paid attention to the fencing.

Did you pay much attention to the track?

I didn't count any of the rails.

What was the condition of the track?

I considered it very good; as good as in any road of the kind.

What was the condition of the fence?

There was a great portion that never had been fenced. I counted about four hundred and fifty panels of fence to repair and renew.

What would it have cost to have put that fence in ordinary repair?

$250, at that time.

Being cross-examined by Mr. Rumsey, he testified as follows:

I suppose you didn't pay much attention to the ties and rail?

We looked over the road and examined it.

Did you give a thorough examination to the ties and rail?

No, sir.

Could you describe their condition?

Yes, sir; but I couldn't say how many ties wanted to be renewed, or how many rails. As a general rule it was in good condition.

177 Where did you find any fence standing?

There was a portion that had been put up when the road was built. Through Ryerss's farm there was some fence out of repair.

Where else was there any fence?

I couldn't tell.

Could you tell whether there had ever been any fencing, or whether it had been carried off by water from the river?

No, sir; I couldn't see any necessity for fencing there. I understood there never had been any there, and so where the side-cuts were.

Where it was so as to require it, there had been fencing?

Yes, sir.

Did you notice where any had been burned up?

Yes, sir; there was, at one point, where there was some new fence.

How much of it was there?

I can't say. I think they had used the old ties and nailed boards on them.

The old ties were used for posts?

Yes, sir.

Q. By Mr. Dininny: Were these old ties or pieces that the old strap rail had been on?

It might have been the old road sills.

Mr. Rumsey, resuming: Where it ran through Ryerss's farm, was it level ground?

Yes, sir.

For a long distance there was a level spot?

Yes, sir; I think there was fence most of the way through there. Some of it had been repaired lately, and some of it was quite old.

COFFIN COLKET was recalled by the defence, and being examined by Mr. Dininny, testified as follows:

Were you over this road with these gentlemen at the time it was examined?

I think I was not. I didn't walk it. I have often examined it by riding in the hind end of the car.

Did you ever examine it so that you can state its condition?

So far as the line and surface is concerned, I can.

178 How was it?

First rate, except in the spring of the year, when the frost was coming out.

I mean about the time this lease expired.

I can't say about that.

Do you remember going over the road in a hand-truck?

I didn't go on foot. As to the iron, I can notice the top surface by riding in the cars. As far as I could see, it was good.

Could the line and surface have been kept in the condition it was in, with a large portion of the ties unfit for use?

No, sir; I believe it was a well-known fact that a road that is not run at all will not keep in good condition.

Could you state the condition of the ditches?

They were always kept in good condition, as roads generally are. A ditch will fill up in half an hour's time. I never saw a road that had all its ditches in good repair all the time.

(Objected to.)

You rode over the road on a hand-car?

I don't know whether I did all the way. I was on the hand-car.

Did you notice the condition of the ditches that day?

I can't say that I did. I didn't notice that they were any fuller than usual.

Did you notice the fence?

Not particularly.

It was in good repair, as far as you could discover?
Yes, sir.

Being cross-examined by Mr. Rumsey, he testified as follows:

You were president of the Tioga road?
I never knew it.
You were a manager of it?
I never knew it.
You were a manager of it?
I was a director.
You and Dougherty took most of the care of it.
We didn't take much care of it.
179 How much iron did you buy for it?
I couldn't say. The superintendent bought all the iron.
There was considerable new iron bought?
Yes, sir.
Those roads were relaid at the same time?
Yes, sir.
Was the new iron that was bought towards the latter end of the lease all taken up on the Tioga road?
I don't know.
Did you ever give any directions about putting the new iron on the new road?
No, sir.
Was there anything said about removing the old iron from that road down to this one?
No, sir.
You never heard of it?
No, sir.
You never were advised by the superintendent that it was done?
No, sir.

Being re-examined by Mr. Dininny, he testified as follows:

Do you mean that there was any large amount of iron bought prior to the expiration of the lease of the Blossburgh road?
I think the last year we bought some two or three hundred tons. I never charged my memory with it. We always bought what the superintendent thought was necessary. His orders were to keep the road in good condition.
His orders from you?
Yes, sir; and from the company.

JOHN DONOVAN was sworn as a witness for the defendant, and being examined by Mr. Dininny, testified as follows:

Where do you reside?
In Morris Run.
What is your business?
Mining.
What was it in 1862?
Railroading.
Where were you then?
I lived in Lindley, until the 9th of November.
180 Did you control a section of the Blossburgh road?
Yes, sir.
Which section had you?
From the State line.

Your section extended down to John Crowley's?
Yes, sir.
How long were you section-boss on that section?
Pretty near seven years.
What was your duty in that respect?
To keep the road in good repair as I could.
To replace ties and iron as they were needed?
Yes, sir.
What was the condition of the road when you left it?
So far as ties and iron were concerned, it was pretty good. It was in as good order as we had it while I was on it.
It was in safe condition for passing trains on it?
Yes, sir.
State whether there was ties and iron at your disposal along the track for you to put in whenever you deemed it necessary.
Yes, sir.
Did you leave any there?
Yes, sir.
About how many ties did you put in before you left that season?
I can't say exactly; but I think it was betwixt a thousand and twelve hundred. The last summer before that we put in more. The road was filled up pretty well with new ties.
You had replaced most of the ties?
The third summer before I left it I put in two thousand ties, and the next summer not quite so many. I put in every tie I thought should come out.
Did you do the same with the iron?
Yes, sir.
Did you put in any new iron on your section?
Yes, sir.
How much?
I couldn't say.
You put it in when it was necessary?
Yes, sir.
181 Where?
On the straight track that runs from the lower end of the switch at Lindley, down this way, on the main track.
What was the condition of the ditches?
In good condition.
What was the condition of the bridge-timbers across the small streams on your sections, when you left?
They were all good, I believe. Some of them were new, and hadn't been used over three years. I know I put in two new sticks across the bridge by the steam-mill.

Being cross-examined by Mr. Rumsey, he testified as follows:
How many miles had you?
Four and a half.
How many ties were there in a mile?
I don't know; I never counted.
What kind of ties did you put in?
Oak and hemlock and chestnut.
What proportion of oak?
The first year we put in ties, we put in about fourteen hundred, and they were all oak and chestnut.
When was that?

Four years before the road run out.
Before the lease run out?
Yes, sir.
How many did you put in the next year?
Two thousand.
What were those?
Partly oak and chestnut, and some hemlock.
What proportion of hemlock?
About half and half of both kinds.
And the year before you quit?
They were principally hemlock ties.
About sixteen hundred?
Yes, sir.
And the year you did quit, how many did you put in?
Betwixt a thousand and twelve hundred. They were hemlock
182 Those were all that were put in in your section?
We kept putting in ties before that, but never kept any account of them.
There were but few put in before that?
Only a few. We didn't make a general practice of putting in new ties. I don't know how many years we did put in new ties. I think we did for about six years, altogether. In 1856 I got charge of the section, in June; I didn't put many in that year. The next year I put in fourteen or fifteen hundred.
Were there any ties in there, in October, 1862, at the time the lease ran out, that should have been taken out?
I couldn't tell.
Was there any iron on yours that required to be taken off?
In September, 1862, I left the road. To my knowledge, there wasn't any ties but what was sufficient for service as they were the fall before. When we found a tie that would stand a year, we left it in, and if it wasn't we took it out.
Can you tell any thing about the rails when you left?
The rails; to the best of my belief, there was no bad rail, with the exception of two or three, I am not very sure that it was over one.
Why didn't you replace them?
I hadn't time. I left a man to take care of it. I was taken to Pennsylvania to work on the road there, at this time, and he placed a man there who was as well able to take care of it as I was.

JAMES GREEN was sworn as a witness for the defendant, and being examined by Mr. Dininny, he testified as follows:
Where do you reside?
Blossburgh.
What is your business—an engineer, locomotive engineer?
Yes, sir.
183 How long have you been employed in that capacity?
About fourteen years.
Where have you been engaged?
On the Tioga and Blossburgh road.
You ran over this road in 1862 then?
Yes, sir, every day except Sundays.
What was the condition of the Blossburgh and Corning road when surrendered to Magee?
It was in good condition.

If there had been a large number of those ties rotten, and the rails laminated, you would have been very apt to have found it out?
Yes, sir.
What was the line and surface of the road?
First rate.

Being cross-examined by Mr. Rumsey, he testified as follows:
There might have been rotten ties in there, and you not know it?
Yes, sir.
The only way you could tell it would be the inequality in the surface?
Yes, sir.

GEORGE LEWIS was sworn as a witness for the defendant, and being examined by Mr. Dininny, testified:
What is your business?
Locomotive-engineer.
How long have you been engaged in that business?
A little over five years.
Where were you in 1862?
I was firing on the road.
Running from Blossburgh to Corning?
Yes, sir.
You ran over the Corning and Blossburgh, daily?
Yes, sir.
What was the condition of road?
It was good; smooth.

Upon his cross-examination by Mr. Rumsey, he testified as follows:
184 There may have been a good many ugly ties in there and you not know it?
Yes, sir.
You couldn't tell precisely what the ties were without going down on there, and examining them?
No, sir.

LEVI H. SHUTTUCK was recalled by the defence, and being again examined by Mr. Dinniny, testified as follows:
What was the price of ties in 1862?
We were paying twelve and twelve and a half cents.
How much for oak?
Twenty-five cents.
I believe Pratt stated the price of putting in ties?
I think his estimate was correct at $10 a hundred.
There has been some question in reference to your putting in new iron in the Tioga road; what was the condition of the new iron as compared with the old iron you took out?
(To this question the plaintiff's counsel objected. The objection was overruled and the evidence received, to which ruling the plaintiff's counsel duly excepted.)
A. I can state in a general way, that the old iron that was removed was a very good quality of iron and better than the new iron we purchased and put in the track. The iron that was left in, that laid along with these, are still in the road, a portion of them, and the new is wearing out faster than the old.

Did you have any design in putting the new iron there, and the old iron here?

(Objected to.)

Being cross-examined by Mr. Rumsey, he testified as follows:

The new iron was American?

No, sir, it was foreign iron, but wasn't as good as the old iron.

185 Ain't you mistaken about buying hemlock ties at a shilling apiece?

No, sir.

How long did that continue?

In 1864 ties advanced.

How was it while you could have ties delivered in the winter of 1862–3?

I think I could get them then for that.

They did go directly up?

Not until the following winter, the winter of 1863–4. Then I paid two shillings.

For hemlock?

Yes, sir.

Upon his re-examination by Mr. Dininny, he testified:

In reference to the weight of the locomotives that were used on this road up to 1862?

They were called 22 tons gross. I weighed two of them, and they run from twenty-four to twenty-five tons.

What is the weight of the locomotives now used, which were used immediately after Magee took the road?

Some of them thirty-one or thirty-two tons. There was one, in particular, I remember.

What is the weight of the locomotives on the Erie?

From twenty-five to forty tons.

COFFIN COLKET was recalled by the defence, and examined by Mr. Dininny, and testified as follows:

I want to call your attention to this trestle-work here. Do you remember the Tioga Improvement Company?

Yes, sir. The lower end of it belonged to that company.

About how much of it?

About eight or nine hundred feet. They had it built.

It didn't belong to the Blossburgh Railroad Company, at all?

186 No, sir; they owned the iron, and we owned the wood-work. The Tioga Improvement Company was the coal company.

Didn't the iron belong to the Tioga road instead of the Blossburgh road?

Yes, sir; I was mistaken.

No portion of it belonged to the Blossburgh & Corning Company?

No, sir.

Q. By the referee: Didn't the railroad company own any of the trestle-work?

The Blossburgh didn't own the lower end.

Mr. Dininny, resuming. Did the Blossburgh Company own any of it?

When we first commenced, the upper end belonged to Mallory.

Did the Corning and Blossburgh Company own any of it?

I didn't know. The high water carried off part of the trestle-work of the Tioga Improvement Company. They owned about 900 feet.

The plaintiff here resumed.

ANDREW BEERS was sworn as witness for the plaintiff, and being examined by Mr. Rumsey, testified:

You are familiar with the books of the Tioga Railroad Company?

I have had something to do with them.

You have been secretary of the Blossburgh and Corning Company?

Yes, sir.

Did you make an abstract of all the way-bills and freight-bils to ascertain the amounts of freights carried over that road from January 1, 1855, to October 1862?

I remember the commencement. I think it was before that.

Do you recollect now, about what the gross amount of receipts for freights were?

No, sir.

Were they large?

Yes, sir; very large.

About what amount?

I couldn't tell you without the abstract I made. This is a copy of what I made, I think.

187 Can you tell, from that, about the gross amount of the receipts?

I am inclined to think that this is a copy of my abstract.

You made that calculation?

Yes, sir.

Did you allow the plaintiff two-thirds of the amount paid for transportation?

Taking for instance, lumber from Mitchell's to Corning, the rate was one dollar, and the number of thousand feet is figured up at that, and that is divided by three, and that column is headed, "Tioga Railroad, for operating," and the remainder, after taking out one-third, and giving to this road fifteen-twentieths of two-thirds.

If a thousand feet of lumber came upon the road at the Mitchell station, how far is that from Corning?

Twenty miles.

What was the tariff rate for carrying it there?

One dollar.

You take two-thirds of that amount?

Yes, sir.

What proportion of that do you allow to the Corning and Blossburgh Railroad?

Of the two-thirds they have fifteen-twentieths of two-thirds.

And did you figure in that way for all that was carried over the Corning and Blossburgh Railroad, when it was carried part of the way over the Tiogo Railroad?

Yes, sir.

When it was brought upon it at Lawrenceville—there it is eighty-five cents; how did you dispose of that?

(No answer.)

Q. By the referee. Then, how much do you say the Corning and Blossburgh Company is entitled to from Mitchell's?

To fifteen-twentieths of two-thirds of a dollar.

Mr. Rumsey, resuming. If a thousand feet of lumber came on

188 the road at Lawrenceville, there it is eighty-five cents a thousand, what proportion of that do you give to the Corning and Blossburgh Road?

Two-thirds.

I understand you that in all your figuring you adopted that same principle?

Yes, sir.

If it came upon it at Mansfield, where it is $1.30, you take out how much?

One-third on the start, and prorated the balance from there to Corning.

What proportion of the $1.30 did you give to the Corning and Blossburgh Road?

Fifteen thirty-ones of two-thirds of $1.30.

And you adopted the same principle at Covington?

Yes, sir, at every station.

Being cross-examined by Mr. Dininny, he testified as follows:

What was the freight from Covington?

$1.40.

What did you take out?

Allow the Tioga Road one-third, and after taking out that, give the Blossburgh and Corning Road fifteen thirty-ones.

Why do you take out one-third when it run further on our road than on the Corning and Blossburgh Road?

I couldn't tell you anything about that.

How far is Covington?

Twenty-one miles on the Tioga Road.

How far is Lawrenceville?

Five and a half miles.

What is the rate from Blossburgh to Lindley?

I don't know.

Take the tariff rate from Lindley to Blossburgh?

There is no tariff rate for lumber.

Suppose a passenger got on at Blossburgh, and went to Lindley, how much is the fare?

I don't know.

189 How do you divide it?

The figuring was done for passengers, miscellaneous merchandise, and lumber, in the same way. I allowed the Tioga Company one-third on the start, and pro-rated on the two-thirds.

Suppose you run freight from Covington down, you take out only one-third, to start on?

If you figure it out, you will see that it comes out all right.

Q. By Mr. Rumsey. In what way does the Tioga Company get compensation for the running of the trains?

They get, in the first place, one-third, and then their pro rata share of the balance, according to the distance they run on their road.

Being cross-examined by Mr. Reynolds, he testified as follows:

Suppose freight is transported entirely over the Tioga road?

They take it all. We don't hear anything about it on this road.

It is only upon the freight that comes wholly across the Blossburgh and Corning road, or across a portion of it?

That is all.

If it goes wholly across each, there is no difference about it?

No, sir.

When do you give two-thirds to the Blossburgh and Corning road?

When it comes from Lawrenceville, or stations on this side.

How is it when you have freight from Blossburgh ten miles on the Blossburgh and Corning road? Suppose a passenger leaves Blossburgh and comes ten miles over this road, and pays $1.50 fare, how do you dispose of that?

By giving the Tioga Company one-third, and two-thirds of the balance according to the distance on each road. That would be two-thirds of ten thirty-sixths.

190 Two-thirds of ten thirty-sixths of the balance is divided?

Yes, sir.

Being re-examined by Mr. Rumsey, he testified as follows:

Has your paper the calculation of the amount that the Corning and Blossburgh Railroad is entitled to upon that basis of calculation?

I can't say, for these are not my figures.

Does that statement contain the statement of the whole amount of receipts of the road?

Yes, sir, if it is a copy.

Does it contain the amount of the difference in the amount paid by the Tioga road, and the manner in which you did the figuring?

Yes, sir.

And the computation of the interest upon these various amounts, down to October, 1862?

Yes, sir.

Q. By the referee. Won't you tell the difference between the claim of the Corning and Blossburgh Company, and the claim of the Tioga Company, out of which this difference has arisen?

They prorate merchandise and lumber coming from way stations, from Blossburgh clear through from the Blossburgh rate. Anything that came to Corning, from between Corning and Blossburgh, was prorated at the Blossburgh rate.

The plaintiff claims that you should prorate from the point where it came upon the road?

Yes, sir.

And this statement shows the difference between the two, for the time specified?

Yes, sir.

Mr. Rumsey, resuming: What is the difference?

$39,064.44. That is the principal.

Does this contain the statement, from month to month during that whole term?

Yes, sir.

191 Being again cross-examined by Mr. Reynolds, he testified as follows:

And doesn't the difference of $39,064.44, result from a discrimination of rates of freight between the whole distance and short distances on the line of that road?

(To this question, the plaintiff's counsel objected.

The objection was overruled, and the evidence was received, and the plaintiff's counsel duly excepted.)

A. That is the difference in figuring. I can't answer any differently.

Isn't there, in the tariff, a discrimination between rates per mile, between long and short distances?

I think there is, but I haven't tested that?

Have you made up all this account without reference to the tariff?

No, sir.

Can't you tell from that whether there is a discrimination in the tariff between long and short distances?

I haven't had anything to do with that.

If you know upon what principle you have figured, tell me how this difference arises.

It is the difference in the construction of the contract.

If the same rates of freight were in that tariff, in long and short distances, would there be any difference between these companies?

I think not.

Then, is not the entire difference the result of a discrimination in the rates per mile between long and short distances?

Yes, sir.

The discrepancy arises from the different tariff rates in long and short distances?

I think so.

(The statement of computation of the witness was offered in evidence by the plaintiff's counsel, which *which* was received and read in evidence, and the amount therein stated was the same reported by the referee on that point, and the correct amount upon the principle on which the referee based his report in favor of the plaintiff.)

SEPTEMBER 23D, 1870.

Counsel for plaintiffs offered in evidence the assignment from John Magee to the plaintiff, dated March 4th, 1864, which was received and read in evidence, and of which a copy is hereunto annexed.

192 (This paper may be referred to by either party in the argument.)

Counsel for plaintiffs offered to make proof that the question in dispute here is the same as that tried before.

(Objected to. Objection overruled. Defendant's counsel excepted.)

D. RUMSEY, counsel for plaintiffs, being duly sworn, testified as follows:

I attended as counsel for the plaintiff on the trial of the former action, of which the record has been given in evidence. The only question in controversy there——

(Objected to.)

The witness proposes to state what matters were in controversy in that suit.

(Objected to on the grounds that it can only be proved by proof of what the evidence was. Objection overruled. Defendant's counsel excepted.)

The only question in controversy in that action was whether the discriminations for motive power for short distances were included in the tariff of rates. The defendants contended there that the plaintiffs were entitled only to pro rata *a* estimate on the tariff of rates laid down, in the freights from Corning to Blossburgh and from Blossburgh to Corning, over the whole length of the road. The plaintiffs contended that they were entitled to all the earnings of the road from the points at which the freight and passengers come on the road and so far as they were transported over the Corning and Blossburgh Railroad, at that rate. The contract itself provided that they were to have one-third ($\frac{1}{3}$) for the expense of running, and the plaintiffs were to have two-thirds ($\frac{2}{3}$) of the balance in proportion to the distance run over their road. The question is distinctly stated in the testimony of Mr. Beers in the case in the court of appeals. That was the only question in the case.

193 Cross-examination by defendant's counsel.

You say the only question was whether the discriminations referred to by the contract w*as* referred to by the tariff of rates?

It is the same question I have referred to. The ques was what share were they to have?

You simply say the only question litigated was whether, in fact, the discriminations on account of motive power for short distances was, in fact, embraced in the tariff of rates?

That is principally the question.

Was that the question?

That was the question.

Was it the only question?

Yes; I think it was the only question.

Therefore a mere question of fact?

There was no other question litigated, and the only evidence given on that question.

It was proved then, on that occasion, that these discriminations were not embraced in that tariff?

The only proof, on that question, was the testimony of Mr. Beers.

I ask you whether it did not appear, on the trial of that case, so far as that case was concerned, that there was no such discrimination in the tariff of rates?

It was contended——

I don't ask that.

It was proved upon that trial.

No, no, no. That was not the only proof. I ask whether it was not established, in the trial of that case, that there was no discrimination made in the tariff of rates. Was it or was it not?

There was no question made about that.

The question is, did it appear on that trial, whether there was or was not a discrimination?

That did not appear except as it was apparent from the testimony.

You have stated that the only question was whether the discrimination referred to in the contract on account of motive power for
194 short distances was or was not included in the tariff. Is that so?

That was the only question.

Was it not established on that trial that there was no such discrimination in the tariff?

No, sir; there was no proof upon that question.

Then the question in controversy was not tried?

Yes, sir, it was. It was the legal construction of that contract.

Then the question was not whether the tariff of rates embraced this discrimination?

Yes, sir; the defendant claimed——

I don't want that.

By the referee. The point, it seems to me, is, whether the tariff of rates showed this discrimination?

It did not; that was so held and so claimed. I propose to make this statement, that, on that trial, the defendant claimed all the way through that the increased price of carrying freight, for short distances over long distances, was the discrimination for motive power.

By the referee. The tariff of rates did not show the discrimination?

No, sir; they claimed it did. The plaintiffs claimed it did not; that the discrimination' alluded to in the contract were discriminations outside the tariff rates.

Was there any proof given on that trial to show that, outside the tariff of rates, there was any discrimination made?

Yes, sir; Mr. Stearns testified, on that trial, that they ran saw-logs over the road under special contract; and he testified also——

Is that in the record there?

No, sir; he testified they made special contracts for running saw-logs outside the tariff rates.

That is not the question. The question is, was there any evidence given to show that there was any discrimination made outside the tariff of rates?

Simply that they made bargains for transporting timber out-
195 side the tariff of rates. Then there was the evidence of Mr. Stearns.

He testified that we——

Was there any evidence on that trial that showed any discrimination for short distances outside the tariff of rates?

Yes, sir; there was.

What was that evidence?

That was the testimony of Mr. Stearns, in regard to the saw-logs.

Did this testimony, in regard to saw-logs, have any reference to short distances or long, or was it only special rate to carry that tonnage over the road?

That is all, sir; that was given for the purpose of showing what arrangements were made outside the tariff of rates. And he further testified that they charged customers for unloading and loading freights at warehouses, in addition to the rates stated in the tariff of rates. It was given in reference to that portion of the contract that speaks of additional charges by way of discrimination for motive power for short distances.

Do you claim that that arrangement for carrying saw-logs was made by the Tioga Railroad Company itself, or with the consent of both parties?

I do not recollect.

Don't you know that Mr. Stearns testified on that subject, that in view of the fact that these logs could not afford to pay full rates, that special rates should be made for their transportation, and made it less rates instead of larger?

I do not recollect what was said about the price.

Did Stearns pretend that that was a discrimination for short or long distances, or was it simply for that particular freight being carried over the road?

That was all, sir; and it was offered simply for the purpose of showing that they did not confine themselves to the tariff of rates in regard to all property.

196 ANDREW L. BEERS, called for plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. Rumsey:

Have you examined the books of the Tioga Railroad Company in reference to their earnings?

Yes, sir.

You have made all the statements that have been made in this case, given in evidence here?

I suppose so.

Is that the result of your examination? (Presenting paper to witness.)

Yes, sir.

From what time is that?

From October 15th, 1852, to June 1st, 1854.

On what basis did you make that calculation?

By allowing the Tioga Company one-third ($\frac{1}{3}$,) and then the Bloss-

burgh and Corning Company their proportion, by calculating the difference according to the tariff of rates and the distance run over both roads.

In that calculation how much did you allow to the Blossburgh and Corning road?

Two-thirds, ($\frac{2}{3}$.) I should state here, in reference to the first question you asked me, perhaps, that here is simply a monthly statement. The books, papers, way-bills, etc., could not be found; and October, 1852, and November, 1852, those two amounts are put in gross from the monthly statements.

When you went to their office to look at the books, you could not find the books and papers?

The person in charge didn't know anything about them.

Are these the monthly statements you refer to? (Presenting papers to witness.)

Yes, sir.

Whose handwriting are they in?

I think it is the handwriting of Justin N. Smith.

He was a clerk in that office?

Yes, sir.

Were you a clerk in the office of the Blossburgh and Corning Company?

Not at this time.

197 What did you make that amount from these monthly statements?

(Objected to.)

Do you know that during the months of October and November of that year that this railroad was in operation?

I suppose it was.

Do you know the fact that it was?

Certainly; yes, sir.

You say that Justin N. Smith was a clerk at that time in the office of the Tioga Railroad Company?

Yes, sir.

Is that his handwriting?

I believe so.

Where was this paper made?

They were made in the office of the Tioga Company; I won't be positive about that; I think it was made there.

Where did you get the papers from which you made up that statement?

From the office of the Tioga Railroad Company, from Mr. Stearns.

Was he general agent of that company?

Yes, sir; he furnished all the papers and books.

Were these monthly statements part of the papers from which you made your calculation before?

Yes, sir.

Have you duplicate of them?

I can't say; I think those statements were furnished by the Blossburgh & Corning Co., but they were made by the Tioga Co. When I got bothered I called upon Mr. Stearns; I called upon Mr. Stearns for the papers and books from which those statements were made, so that I could make a general calculation for those two months; I think he had some books with miscellaneous merchandise on, but the books of the general business I couldn't find.

By the referee. Do you know that they rendered monthly statements of that kind?

Yes, sir.

Were they in that same form?

No, sir; they were rendered a little differently after this. The
198 most of them were uniform.

By the referee. Those papers were found in the office of the Blossburgh and Corning Co., in the handwriting of the clerk of the Tioga Co.?

Yes, sir.

The estimate you have made of the earnings for these two months were made from these statements?

I have made no estimate, I have merely put the figures down as the Blossburg & Corning Co. received from them; that is all I have for those two months.

Have you made any estimate of the average?

No, sir.

How long would it take to do it?

A short time. There would be no other way than to agree on two previous months and two months in the following year, or something of that kind.

With the exception of these two months you had the statements and way-bills to refer to; did you make that statement in the same way you testify you made those after that time?

Yes, sir.

How came you to make this?

Mr. Magee employed me.

How thorough was that examination?

As thorough as it could be.

Did you make it month by month and day by day?

Day by day; made calculations and figured them up, every day included.

Are these the monthly statements? (Presenting papers to witness.)

Yes, sir.

What difference did you make, leaving out those two months?

$8,891.02.

Without the calculation of interest?

Without the calculation of interest.

Does that statement show the amount for each month?

Yes, sir, except those two.

Did you calculate the interest there down to any particular time?

I seem to have calculated the interest down to March 1st, 1863.
199 What do you make the gross amount?

$5,893.89.

Counsel for plaintiffs offered in evidence paper marked "Difference 19½ months."

Cross-examination:

What do you mean by difference?

That is the difference between what the Corning Company claimed and the Tioga Company paid.

Under what?

Under the calculation I have made.

By what reasoning have you calculated the difference? How do you get at it?

This calculation I have made on the business of the road.

Upon what principle do you make any difference at all?

The freight and passengers.

Had you the tariff rates?

Yes, sir.

Did you see any discrimination for freights for short distances or long distances?

No, sir.

Wasn't there a discrimination in the tariff on this road between short distances and long distances on account of motive power?

(Objected to. Objection overruled. Plaintiff's counsel excepted.)

I worked from the tariff. The figures were all made from the tariff rates.

Don't you know that in that tariff there were larger rates paid for passengers and freight for short distances than long?

That is a very common thing.

I ask if that was not the fact.

That was the fact I suppose, but I don't know what it is for.

Didn't the difference in months, you have shown here, result from that discrimination?

Yes, sir, it resulted from the difference of the calculation of the two parties.

In making this calculation you had this tariff between these two roads before you; was there not in that tariff a discrimination, and wasn't there a larger charge for freight and passengers, and freight for short distances, than for long?

Certainly.

200 Wasn't the difference you produce the result of that discrimination?

Oh, certainly.

Re-direct examination by Mr. Rumsey:

You say there is a difference in the tariff of rates in long and short distances?

I believe they charged more per mile for short distances; it is customary with all railroads.

Do you know upon what basis the Tioga Company, in rendering their accounts, calculated the amount that was to be paid the Blossburgh & Corning Company?

(Objected to.)

I know what their statement was.

That is one of the statements rendered by the company? (presenting paper to witness.)

Yes, sir.

Does that paper show that in estimating the amount to be paid to the Blossburgh & Corning Company, they figured it from the basis of the price from Blossburgh to Corning?

(Objected to.)

Both parties here agreed to the following statement, dictated by the referee.

The defendants pay to the plaintiffs two-thirds ($\frac{2}{3}$) of the amount received for all freight transported over the plaintiff's road at the rates established in the tariff of prices agreed upon between the parties for the transportation of freight over the whole length of both roads.

The plaintiffs claim that they are entitled to two-thirds ($\frac{2}{3}$) of the earnings over their road according to the tariff of rates for short distances, as well as over the whole road.

The defendants claim that this difference is the discrimination made

in the tariff for short distances for motive power, and is therefore excluded from the receipts by the terms of the contract.

201 Counsel for plaintiffs offered in evidence the statement produced here of the earnings for these two months.

D. RUMSEY recalled for cross-examination.

You put this assignment in evidence?

Yes, sir.

It is in your handwriting?

Yes, sir.

Where was that executed?

In Bath, in my office, by Mr. Magee.

On the day it bears date?

Yes, sir.

It was signed by Mr. Magee?

Signed by Mr. Magee.

And you put it among your papers and have had it there ever since?

Yes, sir. I will state here that I was a director of the Blossburgh and Corning Railroad Company, and it was delivered to me for their benefit, and with reference to the commencement of this action.

How many directors were there on that road?

Thirteen (13.)

Where was their office, their corporate office?

I really don't know. My impression is that it was at Corning.

Didn't the board of directors meet at Corning?

No, sir.

They never had any meeting?

Yes, sir.

When?

I couldn't tell.

Who keeps the books of that company?

I couldn't tell now.

Who did then?

The secretary.

Who was he?

I think Mr. Magee; John S. Magee and myself were the executive committee of that board of directors.

And you constituted the body-corporate?

The board of directors was the body-corporate. We were the executive committee.

202 Did you pay anything for these papers?

I did not.

Did you know of anything being paid for them?

I did not.

It was voluntary?

I don't know.

You don't know of any consideration having been paid by this corporation?

It was a matter that was known, that Mr. Magee owned the whole road.

You say that was made the day of its date. Why wasn't it included in your declaration in the first instance?

I do not recollect. It was forgotten, I think, sir.

(Defendant's counsel here offered in evidence the judgment record in the supreme court of the State of New York in the case of the Bloss-

burgh and Corning Railroad Company against the Tioga Railroad Company, being the same one heretofore offered by the plaintiffs.)

Wasn't the recovery in that case for a part of the same difference you sue for now?

It is the amount we claimed during that time.

The same kind of differences?

Yes, sir.

SEPTEMBER 24TH, 1870.

ANDREW L. BEERS recalled for plaintiffs. Examined by Mr. Rumsey:

Is that statement you hold in your hand the original of the statement you testified to on the former hearing of this case?

Yes, sir.

Does that contain a statement of the earnings of the road according to the tariff?

Yes, sir.

And the payments made by the other road and the differences?

Yes, sir.

Does the statement made by you since that time, except the two months, contain the same thing?

Yes, sir; made on the same principle exactly.

(Counsel for plaintiffs offered in evidence a paper marked "Former Earnings, B.

203 (Objected to. Objection overruled. Defendant's counsel excepts.)

(This evidence is all admitted, subject to the objection of defendant's counsel.)

Cross-examined:

What was the freight principally by which this difference arose?

Lumber.

Where was the lumber shipped?

My recollection is that the majority of it was from the stations between Mansfield and Corning, and a place called Lamb's Creek, and a small place called Kelley's Mill.

Wasn't a majority of it from Old Station and Tioga?

My impression is that there was more from Old Station and Tioga than from any other two stations.

Wasn't there more from these two stations than came over the whole road?

I should think not. There was a good deal from Lamb's Creek and from Kelley's Mill.

More than from Old Station and Tioga?

I think so.

How far is Tioga or Old Station from Lawrenceville?

I think five miles.

There was very little lumber came in the road south of Mansfield?

Very little.

JUSTIN N. SMITH, called for plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. Rumsey:

(Evidence received, subject to objection of defendant's counsel.)

Was you in the employ of the Tioga Railroad Company in 1852?

I was for a short time.

Did you, under their directions, make a statement of the earnings of the road? What capacity was you therein?

A clerk.

Did you make a statement of the earnings of the road for the months of October and November?

I did.

204 Is that it? (presenting paper to witness.)

It is.

Was it furnished to the Blossburgh and Corning Company?

My impression is that it was given to Col. Bostwick.

He was president of that road?

Yes, sir.

Is that the statement?

Yes, sir; it is in my handwriting and made out for that purpose.

Do you know whether at that time there were any books kept?

I went into the office in October, 1852; the road had been in operation, after the relaying of the rail, some two or three weeks. Then there were no books in the office; all the transactions so far were kept on sheets of paper, and there were no books for some time after I went there; I think some four weeks, or along there, before the books came; and up to that time the transactions were all keep' on sheets of paper.

Do you know where these piece' of paper are?

I do not.

Under whose direction did you make out these papers?

Mr. Dougherty. He was secretary and treasurer, and was there a portion of the time.

Cross-examination by Mr. Dininny:

When you got books, were those papers put on the books?

That is my impression that they were transcribed on the books in a somewhat condensed form.

Have you any recollection of making up that statement to be delivered to the Blossburgh and Corning Co., except that it is in your handwriting?

I recollect that it was done at the end of every month.

Have you any recollection of making that statement?

I have no recollection of making this particular statement. I know it was the custom to make statements, and I know from looking at that that it was the statement made.

205 You say Col. Bostwick was president of the Blossburgh & Corning road?

Yes, sir.

How long did he remain president of the Blossburgh & Corning road?

I don't recollect.

For several years?

I think not. I should think Mr. Magee came in the full control soon after the relaying of the road.

Wasn't Col. Bostwick president of the road all the time you were there?

I should think he was.

That is a statement made by the Tioga Co., while Col. Bostwick was president?

I think so.

Was there any objection made to the manner of making up these statements, or a division of the receipts by Col. Bostwick?

I don't recollect any.

He was about there frequently in the office and had the entire control?

He was there frequently.

He had entire control; he was the active managing man?

I don't know anybody else.

By Mr. Rumsey: Did you ever hear Mr. Magee find fault with the manner in which these statements were made out?

I do not remember that I did.

By the same: Have you any doubt these are the statements you made out?

None at all.

Yet you won't be willing to say that there was not a statement made different from that?

I won't say there was not. I recollect it was the custom to make two, one for the office and one to deliver.

Were they not generally made more full than that?

I think they were, after the books were procured.

ANDREW L. BEERS recalled for plaintiffs:

Examined by Mr. Rumsey subject to defendant's objection.

Did you examine the books of that company to see if you could find any more definite statement of the earnings for October and November?

I did.

206 Did you find any more definite statement?

I did not.

(Counsel for plaintiff offered in evidence paper marked "Exhibit C.")

Have you made the estimate of the average difference of these two months compared with any other two months?

I have.

With what months have you compared?

The half of October and whole of November with the receipts for the month of December. As the difference was mainly on lumber, and as there is generally no canal navigation then, I thought it would be the fairest calculation to take the month of December.

How did you find the difference?

By that comparison. The difference for the half month of October is $320.85 and $525.00 for November.

Is there any other way by which you know how you can get at the difference?

No, sir.

W*as* you familiar with the business of the road?

I was from examining the papers.

Cross-examination by Mr. Dininny:

Had you any knowledge of the business of that road at the time the business was transacted?

No, sir.

How do the months of October and November of that year compare with the months of October and November of the succeeding year; tell us what the comparative earnings of the road were in October and November as compared with December of the year previous?

The half month of October in 1852 was $1,388.60 and the half month of October, 1863, was $1,529.33.

Take the next month.

The month of November is $3,145.00 in 1852, and in 1853 is $1,579.32.

JUSTIN N. SMITH recalled for plaintiff. Examined by Mr. Rumsey:

207 What was the freight that was run over the road first after it was relaid?

Principally lumber. I think one train per day of coal. The lumber had accumulated along the line of the road, and the road was used for transporting the lumber as far as its capacity went.

Did that continue through the month of November?

I think it did, till near the close of navigation.

Cross-examination:

What time did you go into the office of the Tioga Company?

Some time in the month of October, '52.

How long had the road been in operation?

Two or three weeks.

Do you know what time the lease commenced in October?

No, sir.

You were not in the office till two or three weeks after they commenced running it under the lease?

No, sir.

Wasn't it a fact that when the Tioga road commenced running this other road the rolling-stock was deficient?

Yes, sir I remember very well there was a great deal of finding fault by the people along the line that wanted to ship and couldn't.

It was admitted that this action was commenced in the supreme court of the State of New York, on the 6th day of May, 1864, and afterwards, upon the petition of the defendant, duly removed for trial, pursuant to the provisions of the acts of Congress, to the circuit court of the United States for the northern district of New York.

The testimony here closed.

And thereupon the counsel for the defendant insisted before the said referee, and requested him to rule and decide that, as to each and

208 every of the claims and demands of the plaintiff which accrued more than six years prior to the commencement of this action, the same were barred by the statute of limitations of the State of New York, and could not be recovered in this action, but the referee refused so to rule and decide, and to this refusal the counsel for the defendant then and there duly excepted.

And the counsel for the defendant further insisted and requested the referee to rule and decide that the defendant at all times after the commencement of the operation of the plaintiffs' railroad under the contract of July 29th, 1851, and up to the commencement of this action, had property within the State of New York, and an office for the transaction of its business at Corning, N. Y., and that its officers, directors, general managing agent, or some of them, were constantly within the State of New York, and that by the laws of said State the defendant was amenable to the process of its courts, and at all times during the period aforesaid capable of being sued in said courts for any demand due from it to the plaintiff, but the referee refused so to rule and decide, and to this refusal the counsel for the defendant then and there duly excepted.

And the counsel for the defendant further insisted and requested the said referee to rule and decide that by the true meaning and construction of the contract, bearing date the 29th day of July, 1851, the plaintiff was not entitled to recover the claims and demands, or any of them,

in the declaration, in this cause mentioned, but the referee refused so to rule and decide, and to such refusal the counsel for the defendant then and there duly excepted.

And the counsel for the defendant further insisted and requested the said referee to rule and decide that by the true meaning and construction of the contract of July 29th, 1851, the defendant was entitled
209 to retain as its own all sums of money earned, collected, and received for the transportation of freight and passengers and mails over the said plaintiff's railroad, resulting from charges made in the tariff of rates, by way of discrimination for short distances, for motive-power, but the referee refused so to rule and decide, and the counsel for the defendant then and there duly excepted to such refusal.

And the counsel for the defendant further insisted and requested the said referee to rule and decide that the plaintiff was not entitled to recover for that part of the claim and demand in the declaration mentioned alleged to have accrued prior to the 1st day of June, 1854, for the reason that all such claims had been settled and adjusted between the defendant and the Corning and Blossburgh Railroad Company, and for the further reason that the action by the plaintiff in the supreme court of the State of New York to recover of the defendant a part of the alleged demand mentioned in the declaration alleged to have accrued between the 1st day of June, 1854, and the 1st day of January, 1855, was a bar, as to all and every part of said claim alleged to have accrued prior thereto, and for the further reason that the plaintiff's claim, if any there be, is entire and cannot be split up and made the foundation of various actions at various times, but the referee refused so to rule and decide, and the counsel for the defendant then and there duly excepted to such refusal.

And the counsel for the said defendant further insisted and requested the said referee to rule and decide that the plaintiff was not, upon the evidence, entitled to recover anything for damages on account of the alleged condition of the railroad of the plaintiff at the expiration of the term of said contract in respect to defective iron, ties, bridges,
210 trestle-work, fences, brush, ditches, &c., but the referee refused so to rule and decide, and to this refusal the counsel for the defendant then and there duly excepted.

The said referee thereupon ruled and decided that the defendant is liable to pay the plaintiff under the contract set forth in the pleadings the proportionate share of the plaintiff of all moneys received by the defendant according to the tariff of rates without any deduction therefrom, and to this decision the counsel for the defendant then and there duly excepted.

The said referee further ruled and decided that the additional charges by way of discrimination for motive-power, which, by the contract, are not to be regarded as receipts, are charges outside of the tariff of rates, and to this decision the counsel for the defendants then and there duly excepted.

The said referee further ruled and decided that the record of the judgment between the same parties in the supreme court of the State of New York, given in evidence, was not a bar in favor of the defendant against the claim of the plaintiff alleged to have accrued between the month of December, 1832, and the 1st day of June, 1854, and to this decision the counsel for the defendant then and there duly excepted.

And the said referee further ruled and decided that the statute of limitations of the State of New York was not a bar to the plaintiff's action as to the whole or any part of the demand sought to be recov-

ered, and to this decision the counsel for the defendant then and there duly excepted.

And the said referee thereupon further ruled and decided that the plaintiff was entitled to recover from the defendant the sum of $94,957.27, together with the costs of this action, and to this decision, and to the allowance of each and every of the items making up
211 the said aggregate amount, as appears from the statement of the referee annexed to this bill of exceptions, the counsel for the defendant then and there duly excepted.

And because none of the said exceptions so offered and made by the counsel for the defendant to the opinions and decisions of the said referee do *not* appear upon the record of the said trial, the said referee, upon the prayer of the counsel for the defendant, hath to this bill of exceptions set his hand and seal according to the practice of the court and the statute in such case made and provided, this 10th day of March, 1871.

S. E. CHURCH, *Referee.*

(Copy.)

Whereas, by a certain instrument bearing date the 13th day of June, 1854, the undersigned, John Magee, did sell, assign, and transfer to the Blossburg and Corning Railroad Company all my right, title, and interest in and to certain contracts before them made by and between the Corning and Blossburg Railroad Company, and the Tioga Railroad Company, and also a certain lease in the said instrument specified;

And whereas, in and by the said instrument, that portion of the moneys due under and by virtue of said contract which had accrued and become payable on or before the first day of June, one thousand eight hundred and fifty-four, were saved and reserved from the effect of the said assignment, as by reference to the said instrument of the date of 13th day of June, 1854, will more fully and at large appear.

Now, therefore, I, the said John Magee, for value received, have sold, assigned, transferred, and set over, and by these presents do sell, assign, transfer, and set over to the said Blossburg and Corning Railroad Company all my right, title, and interest and claim in and to all and singular the said money which had so become due and payable under and by virtue of the said contract so assigned as aforesaid on or before the said first day of June, 1854, and which, in and by the said instrument in writing of the date of 13th day of June, 1854, were saved and reserved from the effect of such assignment, as fully as I have the right to sell and assign the said moneys, or the claim for the recovery thereof: To have and to hold the said moneys, and the claim and demand for the same, to the said Blossburg and Corning Railroad Company, their successors and assigns, forever.

In witness whereof I have hereunto set my hand and seal this fourth day of May, 1864.

JOHN MAGEE. [L. S.]

[5-cent stamp cancelled.]

212, 213 (Copy.)

Judgment record.

In the supreme court of the State of New York.

THE BLOSSBURGH AND CORNING RAILROAD Company, respondents, *against* THE TIOGA RAILROAD COMPANY, APPELLANTS. } Case and exceptions.

R. B. Van Valkenburgh, respondents' attorney. John Maynard, appellants' attorney.

Albany, N. Y.: J. Munsell, law printer, 1871.

214, 215 In the court of appeals of the State of New York.

THE BLOSSBURGH & CORNING RAILROAD Company, respondents, *against* THE TIOGA RAILROAD COMPANY, APPELLANTS. } Supreme Court.

SIR: Take notice that the Tioga Railroad Company, the defendants and appellants in the above-entitled action, appeal to the court of appeals from the judgment affirming the judgment entered in this action in the Steuben County clerk's office on the 16th day of September, 1857, for $6,106.69, which said judgment of affirmance was entered in the Steuben County clerk's office at Bath, N. Y., on the first day of February, 1859, together with $74.10, costs of affirmance, and from the whole of said judgment.

Dated March 1, 1859.

Yours, &c.,

JOHN MAYNARD,
Attorney for Defendants and Appellants.

To R. B. VAN VALKENBURGH, Esq., *Plaintiffs' and Respondents' Attorney*, and
To S. M. ALLEY, Esq., *Clerk of Steuben County.*

(Endorsed:) Supreme Court. The Blossburgh & Corning Railroad Company, respondents, against The Tioga Railroad Company, appellants. Notice of appeal. Filed March 1, 1859. John Maynard, attorney for appellants.

216

217 In the supreme court of the State of New York, county of Steuben.

THE BLOSSBURGH AND CORNING RAILROAD Company *against* THE TIOGA RAILROAD COMPANY.

The plaintiff desires the trial of this action, if any there be, to be held in the county of Steuben.

To Tioga Railroad Company, defendant:

You are hereby summoned to answer the complaint of the Blossburgh and Corning Railroad Company, plaintiff, a copy of which will be filed in the office of the clerk of the county of Steuben, and to serve a copy of your answer on the subscriber at Bath, Steuben County, New York, within twenty days after the service of this summons, exclusive of the day of service, and if said defendant fail to answer said complaint as hereby required, the plaintiff will take judgment against said defendant for fifteen thousand dollars, with interest thereon from the first day of January, 1865, besides costs.

R. B. VAN VALKENBURGH,
Plaintiff's Attorney.

218 STEUBEN COUNTY, *ss:*

I certify that on the 14th day of February, 1855, I served the within summons on Joseph W. Ryers, the president of the within-named Tioga Railroad Company, defendants, by delivery to and leaving a copy thereof with him at Bath, in said county.

G. T. HARROWER, *Sheriff.*

Fees $1.00.

Supreme court.

THE BLOSSBURGH AND CORNING RAILROAD Company
against
THE TIOGA RAILROAD COMPANY.

The Blossburgh and Corning Railroad Company, a corporation organized under the laws of the State of New York, plaintiffs in this action, by R. B. Van Valkenburgh, their attorney, complains of the Tioga Railroad Company, a corporation organized under the laws of the State of Pennsylvania, for that, on or about the 29th day of July, 1851, it was mutually agreed by and between the Corning and Blossburgh Railroad Company, and the said defendants, amongst other things, in substance and effect as follows: The said Corning and Blossburgh Railroad Company agreed to use all due exertion to have the track of their railroad relaid with heavy iron rails similar to those in use on the New York and Erie Railroad, or of the pattern called the continuous rail, such as is manufactured by J. T. Winslow, of Troy, and to maintain and keep the same in repair when so relaid. The said Corning and Blossburgh Railroad Company further agreed to furnish, free of charge, for the use of the said Tioga Railroad Company suitable grounds in the village of Corning for the necessary depots, machine-shops, and engine-houses,
219 with sufficient grounds at or near the depot of the New York and Erie Railroad, and also upon the river-front at some convenient point, and necessary facilities for the business of the railroads of the said companies, not including the coal and lumber business of the Tioga Railroad Company, and, also, free of charge, to erect, maintain, and keep in repair the necessary depots, machine-shops, and engine-houses at suitable and proper places upon the ground so to be furnished, and, also, to erect, maintain, and keep in repair the necessary water-stations and apparatus at suitable points between Corning and the State line. And it was further understood and agreed that the principal repairs of engines, cars, &c., should be made at the machine-shops, &c., so to be erected in the village of Corning. And the

said Tioga Railroad Company agreed on their part to use all due diligence to have the track of their railroad, from Blossburgh to the State-line, relaid with heavy iron rails of the description of one of the kinds above specified, and to maintain and keep the same in repair when so relaid; that said Tioga Railroad Company also agreed that, when the tracks of the said railroad should be completely relaid, and the depots, machine-shops, engine-houses, and water-stations, and apparatus, built and ready for use as above provided, they would purchase, from the owners of the same the locomotives, machinery, and cars then in use on the railroad of the said companies, at a cash valuation, to be made by disinterested persons, each party choosing one, and, in case such persons could not agree, they to be at liberty to choose a third, and to pay for the same in the preferred certificates of loan of the said Tioga Railroad Company, bearing seven per cent. interest. And the said Tioga Railroad Company did further agree that, when the said railroad should be relaid and ready for use as aforesaid, they would op-
220 erate the same from Corning to Blossburg for the purpose of transporting passengers, mails, coal, lumber, merchandise, and such other freights as should be furnished for transportation upon said railroad, and, for that purpose, should furnish and provide, maintain and keep in repair, the necessary motive-power, engines, machinery, and cars, (nevertheless that the said Tioga Railroad Company should not be found to furnish coal-cars,) for all the regular business that should be furnished to the said railroads. And, in and by the said agreement, it was further agreed that the uniform rates of tolls and charges for transportation of passengers, mails, and freights over and upon the said railroad should be established annually, by the mutual agreement of the said companies, and, in case of disagreement between them, such rates of tolls and charges shall be settled by disinterested persons, each party choosing one, and, in case such persons could not agree, they to be at liberty to choose a third. And, for the use of the railroad of the said Corning and Blossburg Railroad Company, and the use of their depots, engine-houses, machine-shops, grounds, water-stations, &c., the Tioga Railroad Company agrees to pay to the Corning and Blossburg Railroad Company two-thirds of all receipts for passengers, mails, and freights which should be taken for the said Corning and Blossburg Railroad, the expenses charged customers for the loading and unloading coal, lumber, and other freights, and for warehousing, and such additional charges by way of discrimination as should be made for short distances for motive-power, not to be included in the term receipts as above mentioned. Payments for all cash business was to be made at the end of each and every month from the commencement of said arrangement, and of all other amounts within thirty days from the expiration of each and every month as aforesaid. And the said Tioga Railroad Company was to furnish to the said Corning and Blossburg Rail-
221 road Company way-bills of all the passengers, freights, &c., passing over said road during each and every month at the expiration thereof. And it was further understood and agreed that the said arrangement for operating and running the said railroad should continue for ten years after the said railroad should be relaid and ready for use. And the said plaintiffs further show that, by a certain other arrangement made between the said Corning and Blossburg Railroad Company and the said Tioga Railroad Company, bearing date on the 23d day of October, 1852, it was recited, in substance and effect, that, on the 29th day of July, 1851, the said parties had made and entered into the said above-mentioned and recited agreement, and that differ-

ence had arisen in relation to the same, and that the said parties thereto had agreed to modify the same. And the said Tioga Railroad Company did, in and by said last-mentioned agreement, agree to take the railroad of the said Corning and Blossburgh Railroad Company in its then present condition, to slope, surface, ditch, complete, and finish the same, and to do everything necessary to fit the same for use according to the terms and conditions of said first-mentioned contract. And the said Tioga Railroad Company further agreed to put in a fit and proper condition for use all the water-stations on the railroad of the said Corning and Blossburgh Railroad Company west of Corning. And the said Tioga Railroad Company further agreed, after the iron should be laid on the same, to slope, surface, ditch, and finish in a proper and suitable manner, the turnouts and branches of the said Corning and Blossburgh Railroad on the line of the same, and at the village of Corning. And the said Corning and Blossburgh Railroad Company agree to construct two turnouts on the line of the said railroad at such places as the said Tioga Railroad Company should direct; but the said
222 Tioga Railroad Company should pay an additional expense of grading which should be incurred in consequence of any change in the then present location. And the said Corning and Blossburgh Railroad Company also agreed to fix and put in proper condition their water-tank in the village of Corning, and to continue the track of their said railroad so as to connect with the branches of the Buffalo, Corning and New York, and the New York & Erie Railroads below the village of Corning; and also to finish and complete the depots, machine-shops, and engine-houses, and the necessary tracks to and through the same, with a turn-table or a Y for the purpose of turning engines. And the said Corning & Blossburgh Railroad Company further agreed to secure the tank on the river-side at or near the point of the hill above the village of Corning by sloping and riprapping the said bank, and also the bank at or near Ryers' Eddy, by piles and brush and stones. And in and by said last-mentioned agreement, it was further agreed that, in consideration of the completing and finishing the said railroad of the Corning and Blossburgh Railroad Company, as in the said contract before specified, that the said Tioga Railroad Company were to receive three hundred dollars per mile, to be reserved out of the first earnings of the Corning and Blossburgh Railroad under said contract; and that the length of said railroad, for the purpose of determining the said compensation, as well as the compensation for repairs, hereinafter specified, was thereby fixed at fifteen miles. And the said Tioga Railroad Company further agrees when the track and branches of the said Corning and Blossburgh Railroad should be completed and finished, as thereinbefore specified, to keep and maintain the same in good condition and repair during the continuance of said contract, in consideration of which the said Tioga Railroad Company should receive two hundred and fifty dollars per mile
223 per annum to be reserved in equal monthly payments, out of the earnings of said Corning and Blossburgh Railroad Company during the continuance of said contract as aforesaid, and the said Tioga Railroad Company further agrees to build and maintain on each side of said Corning and Blossburgh Railroad all fences which should be necessary, for which the said Tioga Railroad Company should receive seventy-five cents per rod for all fences they should so build, to be reserved of said earning' of said Corning and Blossburgh Railroad, and which sum of seventy-five cents per rod was to cover the building and maintaining the same during the continuance of said contract; and the said plaintiff further shows that afterward, and on the 15th day of January, 1853, by an agreement endorsed on said last-mentioned contract be

tween the several parties thereto, the Tioga Railroad Company agreed to secure the bank of Ryers's Eddy, by gravel-stone and riprapping, for the sum of twelve hundred dollars, to be paid out of the earnings of the Corning and Blossburgh Railroad Company as provided in said contract for the completion of the Corning and Blossburgh Railroad, and the said Corning and Blossburgh Railroad Company were thereby released from all liability for and on account said bank at Ryers's Eddy, as by the said several contracts above set forth, reference being thereto had, will more fully appear. And the said plaintiffs further show that on the twenty-second day of March, 1854, the said Corning and Blossburgh Railroad Company duly assigned to John Magee, the said above mentioned and recited contract, and all the rights and interests which the said Corning and Blossburgh Railroad Company had in and to the same, and that on the 13th day of June, 1854, the said John Magee duly assigned the same contracts to the said plaintiffs, saving and
224 reserving to the said Magee all moneys which had become due and payable thereon, on or before the first day of June, 1854; of which said several assignments the said defendants had due notice; and the said plaintiffs are still the owners of said contract. And the said plaintiffs further say that the track of said railroad had been relaid, as provided in and by the terms of the said contracts, and that the said defendants had for a long time run and operated said Corning and Blossburgh Railroad before the time of the making said assignment by said Magee to said plaintiff, and have ever since run and operated the said Corning and Blossburgh Railroad, and that the said defendant before the time of the said assignment, so made by said Magee to the plaintiffs as aforesaid, had received and reserved from the earnings of said Corning and Blossburgh Railroad sufficient sums of money to pay them in full the several sums which they were, under the said contracts, entitled to receive, and reserved from the earnings of the said railroad, including the said amounts the said defendants were entitled to reserve monthly for repairs, as provided in and by the terms of said contract. And the said plaintiffs further say that all and singular the provisions and conditions of the said contracts therein contained on the part and behalf of the said Corning and Blossburgh Railroad Company have been fully performed and kept. And the said plaintiffs further say that the said defendants have received for passengers, mails, and freights, which were taken for the said Corning and Blossburg Railroad, between the said first day of June, 1854, and the first day of January, 1855, a large amount of money, to wit, the sum of forty thousand dollars, over and above the several sums which the said defendants were entitled to reserve in monthly payments for repairs upon the said Corning and Blossburgh Railroad, according to the terms and provis-
225 ions of the said contract; yet the said defendants have wholly neglected and refused to pay to the said plaintiffs two-thirds of all of said receipts for passengers, mails, and freights, which were taken for the said Corning and Blossburgh Railroad during the time aforesaid, at the times and in the manner in said contracts for that purpose specified, or in any other manner whatever, and the said defendants have also neglected and refused to furnish to the said Corning and Blossburgh Railroad Company, or to the said plaintiffs, way-bills of all the passengers, freights, etc., passing over said road during each and every month at the expiration thereof. Whereof the said plaintiffs demand judgment against the said defendants for fifteen thousand dollars, with interest from the first day of January, 1855, besides costs.

R. B. VAN VALKENBURG,
Plaintiff's Attorney.

Supreme court.

THE BLOSSBURGH AND CORNING RAILROAD Company
against
THE TIOGA RAILROAD COMPANY.

Answer.

No. 1. The Tioga Railroad Company, defendants, answering the complain*ant* of the Blossburgh and Corning Railroad Company, plaintiff, say that they deny the said complaint, and each and every allegation thereof, except as is hereinafter expressly admitted.

No. 1. The defendants admit that they are corporation, organized under and by virtue of the laws of the State of Pennsylvania, as in the complaint set forth, and they aver that they were such corpora-
226 tion, so organized as aforesaid, on and prior to 29th of July, 1851, and they admit the making of the agreement of July 29th, 1851, by and between the defendants and the Corning and Blossburg Railroad Company mentioned in the complaint, but they say that the same is not truly nor in substance or effect set forth in the complaint as therein alleged, but that a true copy of such agreement is hereto annexed, marked "A," which the defendants pray may be taken as a part of their answer to the said complaint.

No. 1. The defendants also admit the making of the agreement of October 23d, 1852, by and between the same parties also mentioned in the complaint, but they say that the same is not truly, nor in substance or legal effect, set forth in the complaint; that a true copy of such agreement is hereto annexed, marked "B," which the defendants pray may be taken as a part of their answer to said complaint. The defendants further admit the making of the agreement of the 15th of January, 1853, referred to in the complaint, but they aver that this agreement is not truly, nor in substance or effect, set forth in the complaint as therein alleged, but that a true copy of such agreement is hereto annexed, marked "C," which the defendants pray may be taken as part of their answer to said complaint. And the defendants, further answering, say that by an agreement bearing date April 7, 1852, made by and between the Corning and Blossburg Railroad Company and the Bank of Corning of one part, and the Tioga Railroad Company of the other part, it was, amongst other things, agreed as follows: That whereas by an agreement dated the 29th day of July, 1851, both companies were to relay their respective roads as soon as practicable, and also to do and perform other covenants therein set forth; and whereas both companies are now about to proceed forthwith to relay their respective roads, and it is
227 hereby mutually covenanted and agreed that as soon as the Tioga Railroad Company shall have laid fifteen miles of their road upon the wide or 6-foot gauge, that the Corning and Blossburgh Railroad shall immediately proceed to alter their road to a like broad gauge, and to complete the same at as early a period as the Tioga Railroad shall be completed, and the Corning and Blossburgh Railroad Company also agrees on or before said period to furnish and complete all the depots, accommodations, machine-shops, et cetera, at Corning, as agreed upon on the original contract of 29th July, 1851, and set forth upon a paper hereto annexed, "A." The said defendants, further answering, say that all and singular the terms, conditions, and stipulations on each and every of the before-mentioned agreements contained, on their part

to be observed, kept, and performed, have been by them on their part faithfully and fully performed, kept, and observed, but that the said Corning and Blossburgh Railroad Company did not, and have not, nor hath any one for them, or in their behalf, observed, kept, nor performed the terms, conditions, and stipulations in the said agreements contained to be on their part and behalf observed, kept, and performed, the matter and things following, to wit: That although the said Tioga Railroad Company, pursuant to and in the agreement of the 29th of July, 1851, and of the 7th of April, 1852, and prior to the 11th day of October, 1852, relaid their railroad on the broad or 6-foot gauge, and has the same completed and ready for use the entire length of their road, to wit, from the State line near Lawrenceville in Pennsylvania to Blossburgh, the terminus of the said road, and had ready for use at Corning sufficient machinery, motive power, and cars to run and operate the said two roads in connection, pursuant to and according to the intent and meaning of the said agreement of July 29th, 1851, and of 7th
228 of April, 1852, of all which the said Corning and Blossburgh Railroad Company had notice, to wit, on the 11th day of October, 1852, aforesaid, yet the said Corning and Blossburgh Railroad Company did not by the same time, nor for a long time thereafter, to wit, for the space of three months next after the said 11th day of October, 1852, alter their road to a like broad-gauge and complete the same, but wholly neglected so to do; whereby, by reason of such failure and neglect, the defendants were compelled to and did sustain great damage, to wit, the sum of five thousand dollars, on being deprived of and prevented from having the use, benefit, and advantage of the running and operating the said roads pursuant to the said agreement, and in being hindered, delayed, and prevented from getting their said machinery, motive power, and cars on the said Corning and Blossburgh Railroad, nor did the said Corning and Blossburgh Railroad Company within same, nor did they at any time thereafter, down to and including the year 1854, furnish and complete all the depot', accommodations, machine-shops, et cetera, at Corning, as agreed upon in the original contract of 29th July, 1851; whereby, and by means thereof, the defendants sustained great loss and damage, to wit, the sum of five thousand dollars in being deprived of shelter for their engines and machinery and cars, by means whereof the same were greatly injured and depreciated in value, and in being deprived of the use of machine-shops, by reason whereof they were compelled to and did expend divers large sums of money in procuring and fitting a place wherein to do their work of repairs, &c., and in being deprived of the use of a passenger depot and accommodations; nor have the said Corning and Blossburgh Railroad Company at any time prior to the commencement of this action fixed, put, and kept in proper condition their water-tank at the village
229 of Corning, but, on the contrary thereof, wholly neglected and refused to fix, put, and keep the same in such condition as that the same could be used or be of any benefit to the defendants in operating the said railroad, or in any other way, whereby the defendants were compelled to, and did suffer and sustain great loss and expense in being compelled to supply their engines used by them in operating the said railroads from the waters of the Tioga River, and in driving the said engines a great distance to procure water sufficieut for the purposes of the same, to wit, the sum of five hundred dollars; nor have the said Corning and Blossburgh Railroad Company at any time hitherto continued the tracks of their railroad so as to connect with the branches of the Buffalo, Corning, and New York and Erie Railroad below the

village of Corning, pursuant to the said agreement of October 23d, 1852, by reason whereof the defendants in the ordinary business of operating the said railroad have been put to great inconvenience and expense for the want of the said tracks in the transshipment of freights and merchandise to and from the cars of the said respective roads, which might and would otherwise have been saved and prevented, to wit, the sum of two thousand five hundred dollars; nor have the said Corning and Blossburgh Railroad Company at any time hitherto completed and finished the necessary tracks to and through the depots, machine-shop, and engine-houses pursuant to the said agreement, by reason whereof the defendants have incurred and been put to great expense and trouble in the ordinary and necessary business of the said road, in operating the same in getting to, from, and into the said depots, machine-shops, and engine-houses with their cars, machinery, and engines, to wit, the sum of two thousand five hundred dallars; nor have the said Corning and Blossburgh Railroad Company at any time hitherto secured the
230 banks on the river side of their railroad, at or near the point of the hill above the village of Corning by sloping and riprapping the same, or in any other manner, so as to secure the same, as provided by the agreement of October 23d, 1852, aforesaid, whereby, and by reason whereof, the said bank has been all along and remains unsafe and insecure, making the ordinary running and operating the said railroad unsafe and dangerous, and by reason whereof the said bank has been washed off by storms and floods at different times so as to delay and hinder the ordinary business of the said road, and has by such delays and hindrances added largely to the expenses as well as the risk of running and operating the same, and whereby the defendants have been compelled to, and have been put to great expense in endeavoring to, repair the same so as to secure the safety of the road, and prevent hindrances and delays, after notice to and the omission and neglect of the said Corning and Blossburgh Railroad Company to repair the same, to the amount of two thousand five hundred dollars; nor did the said Corning and Blossburgh Railroad Company at any time prior to the 15th day of January, 1853, secure the bank on the river side of their said road at or near Ryers's Eddy by piles and brushes and stones, or in any other manner as provided in the agreement of October 23d, 1852, but for and during all that time the same was left by them insecure and unsafe, thereby hindering, delaying, and rendering dangerous the ordinary running and operating the said railroad, and thereby adding to the expense of running said road, and rendering temporary repairs to the same from time necessary, whereby the defendants, in repairing the same, after notice to, and neglect of the said Corning and Blossburgh Railroad Company to repair the same to the amount of one thousand dollars, all which said several sums of money, or sufficient thereof, the defendants will claim to have allowed to them by way of set-
231 off, recompense, or satisfaction of any demands of the plaintiffs to be proved or established against them on the trial of this action; and the said defendants, for their answering, say that the said plaintiffs were not at the time of the commencement of this action, and are not, a body-corporate, and have no right as such to commence or prosecute this action.

No. 4. The said defendants, further answering, say that the said agreement in the complaint mentioned were not, nor was either of them, at the time in the complaint stated, or at any other time, duly assigned to John Magee in the complaint mentioned, but they aver that the said

alleged assignments were unauthorized and void, and of no force or effect.

No. 5. And the said defendants, further answering, say the said agreements in the complaint mentioned were not, nor was either of them, at the time in the complaint stated, or at any other time, duly assigned by the said John Magee to the said plaintiffs; but they aver that the said alleged assignment' were unauthorized and void, and of no force or effect, and they say that the said plaintiffs have no right, property, or interests therein, nor to any sum or sums of money due thereon, or by virtue thereof, and are not the parties in interest in this action, but that the said agreements, and all sums of money due and to grow due thereon, or on account of the same, *is* the right, property, and interest of the Corning and Blossburgh Railroad Company, its successors and assigns.

No. 6. And the said defendant', further answering, say that, before and at the time of the commencement of this action, the said plaintiffs were and still are indebted to the defendants in the sum of one thousand dollars for so much money before that time had and received
232 to and for the use of said defendants, and for money by the said defendants before that time lent and advanced to and paid, laid out and expended for the said plaintiffs, and at their request, and in the further sum of two thousand and five hundred dollars for the work, labor, and service by the said defendants and their servant' before that time done and performed in and about the business of the plaintiffs, at their request, and for divers materials and other necessary things by said defendants before that time found and provided, and used and applied in and about the said work and labors for the said plaintiffs, and at their like request, which said sums of money in this count mentioned the defendants, on the trial of this action, will claim to set off against any demand of the plaintiffs against them to be proved on the said trial.

No. 7. And for a further defense the said defendants say that the said plaintiffs ought not further to have or continued this action against them, for that, heretofore, on or about the 19th day of April, 1855, and after the commencement of this action, at Corning, in the county of Steuben, the said plaintiffs and the said defendants accounted together of and concerning all and singular the matters, things, and alleged causes of action in the complaint set forth; on which accounting there was found due to the plaintiffs, on account of and concerning the same, the sum of $2,044.05, which said sum of money the defendants then and there paid unto the said plaintiffs, who received the same in full payment and satisfaction of all and singular the matters, things, and cause of actions aforesaid. Wherefore the defendants demand that the said complaint against them be dismissed, with their proper costs and charges.

JOHN MAYNARD,
Defendants' Attorney.

233 A.

It is mutually agreed by and between the Corning and Blossburg Railroad Company, of the State of New York, of the one part, and the Tioga Railroad Company, of the State of Pennsylvania, of the other part, as follows:

The said Corning and Blossburg Railroad Company agree to use all due exertion to have the track of their railroad relaid with heavy iron rail, laid similar to those in use on the New York & Erie Railroad, or

the pattern called the continuous rail, such as is manufactured by J. T. Winslow, of Troy, and to maintain and to keep the same in repair when so relaid; the said Corning and Blossburg Railroad Company to furnish, free of charge, for the use of the said Tioga Railroad Company, suitable grounds in the village of Corning for the necessary depots, machine-shops, and engine-houses, with sufficient grounds at or near the depot of the New York and Erie Railroad, and also at the river front, at some convenient point, and necessary facilities for the business of the railroad of the said companies, not including the coal and lumber business of the Tioga Railroad Company; and, also, free of charge to each, maintain and repair the necessary depots, machine-shops, and engine-houses at suitable and proper places upon the ground so to be furnished, and, also, to erect, maintain, and keep in order the necessary water-stations and apparatus at suitable points between Corning and the State line. And it is further understood and agreed that the principal repairs of engines, cars, &c., shall be made at the machine-shops, &c., so to be erected at the village of Corning. The said Tioga Railroad Company agrees, on their part, to use all due diligence to have the track of their railroad from Blossburg to the State line relaid with heavy iron
234 rails of the description of one of the kinds above specified, and to maintain and keep the same in repair when so relaid. The said Tioga Railroad Company also agree that, when the track of the said railroad shall be completely relaid, and the depots, machine-shops, and engine-houses, water-stations, and apparatus built and ready for use, as above provided, they will purchase from the owners of the same the locomotives, machinery, and cars now in use on the railroad of the said companies at a cash valuation to be made by disinterested persons, each party choosing one, and in case such persons cannot agree, they to be at liberty to choose a third, and to pay for the same in the preferred certificates of loan of the said Tioga Railroad Company, bearing seven per cent. interest. The said Tioga Railroad Company further agree that, when the said railroad shall be relaid and ready for use, as aforesaid, they will operate the same, from Corning to Blossburg, for the purpose of transporting passengers, mails, coal, lumber, merchandise, and such other freights as shall be furnished for transportation upon the said railroad, and for that purpose shall furnish and provide, maintain, and keep in repair the necessary motive-power, engines, machinery, and cars (nevertheless they shall not be bound to furnish coal-cars) for all the regular business that shall be furnished to said railroad. Uniform rates of tolls and charge for transportation of passengers, mails, and freights on and upon the said railroad shall be established annually by the mutual agreement of the said companies; and in case of disagreement between them, such rates of toll and charges shall be settled by disinterested persons, each party choosing one, and in case such persons cannot agree, they to be at liberty to choose a third; and for the use of the said railroad of the said Corning and Blossburgh Railroad Company, and the use of their depots, engine-houses, machine-shops, grounds, water-
235 stations, &c., the Tioga Railroad Company agrees to pay to the Corning and Blossburgh Railroad Company two-thirds of the receipts for passengers, mails, and freights, which shall be taken for the said Corning and Blossburgh Railroad, the expenses charged customers for the loading and unloading coal, lumber, and other freights, and for the warehousing, and such additional charges, by way of discrimination, as shall be made for short distances for motive power, not to be included in the term receipts, as above mentioned; payments for all cash business to be made at the expiration of each and every month from the commence-

ment of this agreement, and of all amounts within thirty days from the expiration of each and every month as aforesaid; and the said Tioga Railroad Company are to furnish to the said Corning and Blossburgh Railroad Company way-bills of all the passengers, freights, &c., passing over said road during each and every month at the expiration thereof. It is understood and agreed that the foregoing arrangement for operating and running the said railroad shall continue for ten years after the said railroad shall be relaid and ready for use. It is further mutually agreed, subject, however, to the ratification by the directors of the Tioga Railroad Company, that the said Corning and Blossburgh Railroad Company and the said Tioga Railroad Company shall each relay their roads on cross-ties of sufficient length to allow an alteration of the track to a gauge of six feet in width. But the said railroads are to be relaid and opened for use on a four feet eight and one-half inch gauge, and should the board of directors of the Tioga Railroad Company desire the width of the gauge of the two roads altered to the width of six feet, the Corning and Blossburgh Railroad Company and the Tioga
236 Railroad Company shall, at any time after the expiration of twelve months from the time said railroad shall be relaid, as hereinbefore provided, alter the track to a six-feet gauge, and it is agreed that the said alterations from a four feet eight and one-half inch to a six-feet gauge shall be made as soon as practicable by the Corning and Blossburgh Railroad Company after the board of directors of the Tioga Railroad Company shall notify the said Corning and Blossburgh Railroad Company of their desire that such alteration shall be made; provided that the Tioga Railroad Company have purchased the locomotives, cars, and machinery now in use on the said roads, from the parties holding them, and paid for the same in the preferred certificates of loan, bearing seven per cent. interest, as hereinbefore provided.

Dated July 29, 1851.

CORNING AND BLOSSBURGH RAILROAD COMPANY,
By H. W. BOSTWICK.

TIOGA RAILROAD COMPANY,
By JOSEPH W. RYERSS.
W'M E. MORRIS,
COFEIN COLKET,
A. E. DOUGHETTY,
A. DOUGHERTY, *Att'y*,
Committee on Consolidation.

B.

Whereas, on the 29th day of July, A. D. 1851, the Corning and Blossburgh Railroad Company of one part, and the Tioga Railroad Company of the other part, made and entered into an agreement for the relaying the tracks of their respective railroads and the rebuilding of the necessary depots, machine-shops, and engine-houses, and for operating the said railroad, as by said contract, reference being had thereto,
237 will more fully appear; and whereas differences have arisen to the same, and the said parties have agreed to modify the same as hereinafter specified: Now, therefore, this agreement witnesseth, that the said Tioga Railroad Company agrees to take the railroad of the said Corning and Blossburgh Railroad Company, in its present condition, to slope surface, ditch, complete, and finish the same, and do everything necessary to fit the same for use according to the terms and conditions of said contract. The said Tioga Railroad Company further agrees to

put in a proper and fit condition for use, all the water-stations on the railroad of the said Corning and Blossburgh Railroad Company west of Corning. The said Tioga Railroad Company further agree, after the iron shall be laid on the same, to slope surface, ditch, and finish in a proper and suitable manner the turnouts and branches of the said Corning and Blossburgh Railroad, on the line of the same and at the village of Corning. The said Corning and Blossburgh Railroad Company agree to construct two turnouts on the line of the said railroad, at such places as the said Tioga Railroad Company shall direct; but the said Tioga Railroad Company shall pay any additional expenses of grading which shall be incurred in consequence of any change of present locations. The said Corning and Blossburgh Railroad Company also agree to fix and put in proper condition their water-tanks at the village of Corning. The said Corning and Blossburgh Railroad Company further agree to continue the track of their railroad so as to connect with the branches of the Buffalo, Corning, and New York, and New York and Erie Railroad below the village of Corning, and also to complete and finish the depots, machine-shops, and engine-houses, and the necessary tracks to and through the same, with a turn-table or an "Y" for
238 the purpose *for* turning engines. In consideration of the completing and finishing the said railroad of the Corning and Blossburgh Railroad Company, as hereinbefore specified, the said Tioga Railroad Company are to receive three hundred dollars per mile, to be reserved out of the first earnings of the said Corning and Blossburgh Railroad under said contract, and the length of said railroad, for the purpose of determining said compensation, as well as the compensation for repairs hereinafter specified, is hereby fixed at fifteen miles. The said Corning and Blossburgh Railroad Company further agree to secure the bank on the river side, at or near the point of the hill above the village of Corning, by sloping and riprapping the said bank, and also the bank at or near Ryerss' Eddy, by piles and brush and stone, the sufficiency of the same, if, when completed, not satisfactory to the Tioga Railroad Company, to be determined by H. Brewer and P. Janet, or by an umpire chosen by them in case of their disagreement. The Tioga Railroad Company further agrees, when the track and branches of the said Corning and Blossburgh Railroad shall be completed and furnished, as hereinbefore specified, to keep and maintain the same in good condition and repair during the continuance of said contract; in consideration of which the said Tioga Railroad Company shall receive two hundred and fifty dollars per mile, per annum, to be reserved in equal monthly payments out of the earnings of said Corning and Blossburgh Railroad Company during the continuance of said contract as aforesaid. The said Tioga Railroad Company further agree to build and maintain, on each side of the said Corning and Blossburgh Railroad, all fences which shall be necessary, for which the said Tioga Railroad Company shall receive seventy-five cents per rod for all fences they shall so build, to be reserved out of the said earnings of the said Corning and Blossburgh Railroad, and which sum of seventy-five cents per rod is
239 to cover the building and maintaining the same during the continuance of said contract.

Dated Corning, October 23, 1852.

HIRAM W. BOSTWICK,
President of the Corning and Blossburgh Railroad Company.
JOSEPH W. RYERSS,
President of the Tioga Railroad Company.

(Endorsed:) C.

CORNING, *January* 15, 1853.

It is hereby agreed that the Tioga Railroad Company will secure the bank, at or near Ryerss' Eddy, by gravel, stones, and riprapping, for the sum of twelve hundred dollars, to be paid out of the earnings of the Corning and Blossburg Railroad Company, as provided in the annexed contract for the completion of the Corning and Blossburg Railroad; the said Corning and Blossburg Railroad Company, being released from any liability for or on account of said work at Ryerss' Eddy.

(Signed) HIRAM W BOSTWICK,
President of the Corning and Blossburg Railroad Company.
A. E. DOUGHERTY,
Secretary and General Agent of the Tioga Railroad Company.

Supreme court.

THE BLOSSBURG & CORNING RAILROAD COMPANY
against
THE TIOGA RAILROAD COMPANY.

The plaintiff, for reply to the answer of the defendants in this action, denies each and every allegation of new matters constituting a counter claim in said answer contained.

R. B. VAN VALKENBURG,
Plaintiff's Attorney.

240 At a special term of the supreme court of the State of New York, held at the court-house, in the village of Bath, in the county of Steuben, on the 5th day of November, 1855—present, Hon. Thomas A. Johnson, justice:

THE BLOSSBURG & CORNING RAILROAD COMPANY
against
THE TIOGA RAILROAD COMPANY.

On filing a stipulation in writing, signed by the attorneys for the respective parties, on motion of R. B. Van Valkenburg, plaintiff's attorney, ordered, that this action be, and it is hereby, referred to Hon. Daniel S. Dickinson, as sole referee, to hear, try, and determine the same.

(A copy.)

S. M. ALLEY, *Clerk.*

Supreme court.

THE BLOSSBURG & CORNING RAILROAD COMPANY
against
THE TIOGA RAILROAD COMPANY.

I, Daniel S. Dickinson, the referee appointed in this action, having heard the proofs and allegations of the parties, and duly deliberated thereon, do find the following, as the facts in the case:

1. That the plaintiffs are a corporation duly organized under and according to the laws of the State of New York.

2. That the defendants are a foreign corporation duly organized under and by virtue of the laws of the State of Pennsylvania.

241 3. That the said defendants, on the 29th day of July, 1851, and the Corning and Blossburg Railroad Company, a corporation duly organized under the laws of the State of New York, made and executed the agreement of the date last aforesaid, as stated and set out in the complaint, and that the same parties also made and executed the two several agreements, as stated in the complaint bearing date respectively on the 23d day of October, 1852, and the 15th day of January, 1853.

4. That on the 22d day of March, 1854, the said Corning and Blossburgh Railroad Company duly assigned the said contract, above mentioned, to John Magee, as stated in the complaint, and that on the 13th day of June, 1854, the said John Magee duly assigned the said contract to the plaintiffs in manner and form as is stated in the complaint, saving and reserving to said Magee all moneys which had become due and payable thereon or before the first day of June, 1854; that the defendant had notice of such assignments, and that the plaintiffs are still the owners of said contract.

5. That the tracks of said railroad were relaid, and the works done thereon as provided for in said contract, and that the defendants had, for a long time before the assignment of said contract by Magee to the plaintiffs, and have ever since run and operated the said Corning and Blossburg Railroad under the terms and provisions of said contract, as is charged in the complaint.

6. That two-thirds of the receipts by the defendants for passengers, mails, and freights, taken for the said Corning and Blossburgh Railroad Company, under and according to the terms and provisions of the said contract, between the first day of June, 1854, and the first day of January, 1855, amount to thirty-four thousand eight hundred and twenty-nine dollars and eighty-nine cents, ($34,829.89,) over and above all sum' which the defendants were entitled to retain under the provision
242 of said contract, of which sum the defendants have at different times paid to the plaintiffs the sum of twenty-nine thousand nine hundred and eight'-two dollars and eighty-five cents, ($29,982.85,) leaving a balance due from the defendants, to the plaintiffs, of four thousand eight hundred and forty-seven dollars and four cents, ($4,847.04,) and it was admitted by the parties on the trial that the balance found due the plaintiffs should have interest from the first day of Sept., 1854, which interest, to this date, amounts to the sum of ten hundred and seven dollars and fifty cents, ($1,007.50.) And I do further find on a conclusion of law that the defendants are indebted to the plaintiffs in this action in the sum of five thousand eight hundred and fifty-four dollars and fifty-four cents, ($5,854.54,) which sum the plaintiffs are entitled to recover of the defendants in this action, with costs.

D. S. DICKINSON.

Dated 20 Aug., 1857.
Referee's fees, $69.

Supreme court.

THE BLOSSBURGH AND CORNING RAILROAD COMPANY
against
THE TIOGA RAILROAD COMPANY.

This action having been duly referred to Hon. Daniel S. Dickinson, to hear, try, and determine the same, and his report having been filed, whereby he finds that there is due from the defendants to the plaintiffs

the sum of five thousand eight hundred and fifty-four dollars and fifty-four cents, ($5,854.54:) Now on motion of R. B. Van Valkenburgh, plaintiff's attorney, it is hereby adjudged by the said court, that
243 the said plaintiffs recover of the said defendants the sum of five thousand eight hundred and fifty-four dollars and fifty-four cents, together with the sums of two hundred and fifty-one dollars and sixty-nine cents, costs and disbursements, amounting to six thousand one hundred and six dollars and twenty-three cents.

Dated Sept. 16th, 1857.

S. M. ALLEY, *Clerk.*

(Endorsed:) Supreme court. The Blossburgh & Corning Railroad Company against The Tioga Railroad Company. Judgment-roll. R. B. Van Valkenburgh, plaintiff's attorney. Damages, $5,854.44; costs, &c., 251.69—$6,106.23. Filed Sept. 16th, 1867, 1½ p. m.

Supreme court.

THE BLOSSBURGH & CORNING RAILROAD COMPANY,
against
THE TIOGA RAILROAD COMPANY.

Exceptions to report of referee.

The defendant excepts to the finding and report of the referee herein as follows:

1st exception. To the finding that the plaintiffs are a corporation duly organized under and according to the laws of New York.

244 2d exception. To the finding that on the 22d day of March, 1854, the Corning and Blossburgh Railroad Company duly assigned the contract in the report mentioned to John Magee.

3d exception. To the finding that John Magee, on the 13th of June, 1854, duly assigned such contracts to the plaintiffs excepting the reservation in the report mentioned.

4th exception. To the finding that the defendants had notice of such assignment.

5th exception. To the finding that the plaintiffs are still the owners of said contract.

6th exception. To the finding that two-thirds of the receipts by the defendants for passengers, mail, and freights, taken for the said Corning and Blossburgh Railroad, under and according to the term and provision of the said contract, between the first day of June, 1854, and the first day of January, 1855, amounted to $34,829.89 over and above all sums which the defendants were entitled to retain under the provisions of said contract.

7th exception. To finding that of such receipts the defendants have not paid $4,847.04, and that such balance is due from the defendants to the plaintiffs as stated in such report.

8th exception. To the finding that the sum of $1,007.50 is due to the plaintiffs, for interest, as stated in said report.

9th exception. To the finding that the defendants are indebted to the plaintiffs in the sum of $5,854.54, for which sum the plaintiffs are entitled to recover of the defendants in said action.

10th exception. To the omission of the referee to allow any sum to the defendants for motive power for short distances, under the said contract.

245 11th exception. To the finding that two-thirds of the whole amount received for passengers, freights, and mails, taken for the Corning and Blossburgh Railroad under the tariff of rates fixed upon, *is* to be regarded as gross receipts, within the intent and meaning of said contract, without any allowance or deduction therefrom for motive power for short distances.

JOHN MAYNARD,
Defendant's Attorney.

(Endorsements:) Supreme court. The Blossburgh and Corning Railroad Company, against the Tioga Railroad Company. "Exceptions to report." "To file." John Maynard, defendant's attorney. Filed Sept. 8, 1857.

Supreme court.

THE BLOSSBURGH & CORNING RAILROAD COMPANY
against
THE TIOGA RAILROAD COMPANY.

SIR: Take notice that the above-named defendant appeals to the general term of this court from the judgment entered in this action on the 16th day of September, 1857, in the office of the clerk of Steuben County, in favor of the above-named plaintiffs against the above-named defendants for the sum of $6,106.69, recovery and costs.

JOHN MAYNARD,
Defendant's Attorney.

Dated Oct. 13, 1857.

To R. B. VAN VALKENBURGH, *Plaintiff's Attorney.*
SAMUEL M. ALLEY, *Clerk.*

246 (Endorsements:) Supreme court. The Blossburgh & Corning Railroad Company against The Tioga Railroad Company. Notice of appeal. John Maynard, defendant's attorney. To Samuel M. Alley, esq., clerk, &c. Filed Oct. 14, 1857.

STATE OF NEW YORK, *Steuben County, ss:*

I, Samuel M. Alley, clerk of the said county, and of the supreme court of said State held in and for said county, do certify that I have compared the foregoing copy of judgment-roll, referee's report, exceptions thereto and notice of appeal with the originals thereof on file in my office, and that they are true copies of said originals and of the endorsements thereon.

In testimony whereof I have hereunto subscribed my name and the seal of said county at Bath, this 16th day of December, 1857.

[L. S.] S. M. ALLEY, *Clerk.*

Supreme court.

THE BLOSSBURGH & CORNING RAILROAD COMPANY
against
THE TIOGA RAILROAD COMPANY.

Case as settled.

The pleadings in this action, which compose a part of the case, are contained in the judgment-roll.

247 This action came on to be tried before Hon. Daniel S. Dickinson, sole referee, duly appointed in this action at the Dickinson House, in the village of Corning, on the 20th day of June, 1856.

The plaintiffs, to maintain and prove the said issues on their part, offered in evidence exemplified copy articles of association of the plaintiffs in the words and figures following, that is to say:

Whereas, by virtue of an act of the legislature of the State of New York, passed April 5th, 1851, entitled "An act to authorize the Tioga Coal, Iron, Mining, and Manufacturing Company to borrow money to relay their road with a heavy T rail, and to consolidate with the Tioga Railroad Company, and to change the name of said company to the Corning and Blossburgh Railroad Company," it was, amongst other things, enacted that the Tioga Coal, Iron, Mining, and Manufacturing Company should be thereafter known by the name of "The Corning and Blossburgh Railroad Company." And whereas the sheriff of the county of Steuben, by virtue of an execution issued out of the supreme court of the State of New York, against the said Tioga Coal, Iron, Mining, and Manufacturing Company, did, on the thirty-first day of December, one thousand eight hundred and fifty-two, sell at public auction, according to law, the real estate, track, and fixtures of the said company, to John Magee, of Bath, in the said county of Steuben, a certificate of which sale was duly made and filed according to law; and whereas no person having redeemed the said real estate, track, and fixtures from the said sale, the said sheriff did, on the first day of April, one thousand eight hundred and fifty-four, duly execute to the said John Magee a deed in pursuance of such sale for said real estate, track, and fixtures, whereby the said John Magee has become the purchaser thereof,

248 and hath acquired the title thereto in the manner prescribed by law;

And whereas, for the purpose of forming a corporation according to the provisions of the act of the legislature of the State of New York, entitled "An act to authorize the formation of railroad corporations and to regulate the same," passed April 2d, 1850, and the several acts amending the same, the said John Magee hath associated with himself the following-named persons, viz, Duncan S. Magee, David Rumsey, Robert B. Van Valkenburgh, William H. Bull, John Ostrander, Daniel C. Howell, George S. Haverling, Samuel D. Hunter, Timothy Whiting, Perry S. Donahe, Thomas J. Magee, and Frederic Davis, jun.:

Now, therefore, know all men by these presents that we, whose names are hereto subscribed, under and in pursuance of the said act, entitled "An act to authorize the formation of railroad corporations, and to regulate the same," passed April 2d, 1850, and of the several acts amending the same, do form ourselves into a company for the purpose of maintaining and operating a railroad for public use for the conveyance of persons and property.

1. The name of said corporation shall be "The Blossburgh and Corning Railroad Company."

2. The said corporation shall continue ninety-nine years from this ninth day of May, one thousand eight hundred and fifty-four.

3. The railroad to be maintained and operated by the corporation organized by these articles extends from the village of Corning to and through the towns of Erwin and Lindley to the State line, between the States of New York and Pennsylvania, as the same has been heretofore maintained and operated by the Corning and Blossburgh Railroad

249 Company, is of about the length of fifteen miles, and is located wholly within the county of Steuben, and State of New York.

4. The capital stock of the corporation formed by these articles shall be two hundred and fifty thousand dollars, divided into two thousand five hundred shares of one hundred dollars each share.

5. John Magee, David Rumsey, Robert B. Van Valkenburgh, William H. Bull, John Ostrander, Daniel C. Howell, George S. Haverling, Timothy Whiting, Samuel D. Hunter, and Perry S. Donahe, all of the town of Bath, Steuben County; Duncan S. Magee, of Corning, Steuben County; Thomas J. Magee, of Hornellsvile, Steuben County, and Frederick Davis, junior, of Le Roy, Genessee County, all of the State of New York, shall be the first directors of said corporation, who shall manage its affairs for the first year, and until others are chosen in their places.

Dated at Bath, Steuben County, this ninth day of May, A. D. 1854.

Names of subscribers.	Residences.	Number of shares.
John Magee	Bath	Two thousand four hundred & eighty shares.
F. Davis, jr.	Le Roy	One share.
R. B. Van Valkenburgh	Bath, N. Y.	One share.
Duncan S. Magee	Corning, N. Y.	One share.
Daniel C. Howell	Bath, N. Y.	One share.

STATE OF NEW YORK, *Genesee County, ss:*

On the 13th day of May, 1854, before the subscriber, a justice of the peace of said county, came Frederick Davis, junior, known to me to be the person of that name described in, and who executed the within and foregoing instrument, and acknowledged that he executed the same.

RICHARD SMITH.

250 STATE OF NEW YORK,
Genesee County, Clerk's Office, ss:

I certify that Richard Smith, esq., before whom the annexed instrument in writing was proved or acknowledged, was, at the time of taking the same, a justice of the peace in and for said county, duly authorized to take the same, and that I am well acquainted with his handwriting, and verily believe that the signature to said certificate is genuine; and that the annexed instrument is executed and acknowledged according to the laws of this State. In witness whereof, I have hereunto set my hand and affixed my official seal, at Batavia, in said county, this 13th day of May, 1854.

M. G. LOPER, *Clerk.*

S. D. Hunter, Bath, N. Y., one share.
T. Whiting, Bath, N. Y., one share.
T. J. Magee, Hornellsville, N. Y., one share.
W'm H. Bull, Bath, N. Y., one share.
John Ostrander, Kanona, N. Y., one share.
George S. Haverling, Bath, N. Y., one share.
P. S. Donahe, Bath, N. Y., one share.
D. Rumsey, Bath, N. Y., one share.

STATE OF NEW YORK, *Steuben County, ss:*

On the 16th day of May, 1854, before me, the subscriber, a justice of the peace of said county, came John Magee, Robert B. Van Valkenburgh, Duncan S. Magee, Daniel C. Howell, Samuel D. Hunter, Timothy

Whiting, Thomas J. Magee, William H. Bull, John Ostrander, George S. Haverling, Perry S. Donahe, and David Rumsey, to me known to be the persons described in, and who executed the within and foregoing instrument, and severally and respectively acknowledged that they executed the same.

A. D. READ.

251 STATE OF NEW YORK,
Steuben County, Clerk's Office, ss:

I, Charles W. Campbell, clerk of the said county, and clerk of the courts of records in and for said county, do hereby certify that A. D. Read, esq., before whom the annexed instrument in writing was proved or acknowledged, was, at the time of taking the same, a justice of the peace in and for said county, duly authorized to take the same; and that I am well acquainted with his handwriting, and verily believe that the signature to said certificate is genuine; and that the annexed instrument is executed and acknowledged according to the laws of this State.

In witness whereof I have hereunto set my hand, and affixed the seal of said county, and of said courts, at Bath, this 16th day of May, A. D. 1854.

C. W. CAMPBELL, *Clerk.*

STATE OF NEW YORK,
Steuben County, ss:

John Magee, Robert Van Valkenburgh, and David Rumsey, all of said county, being duly sworn, say, and each for himself says, that he is one of the persons named as director in the foregoing articles of association of the Blossburg and Corning Railroad Company; that said railroad therein mentioned is of the length of about fifteen miles; and that at least one thousand dollars of stock for every mile of said railroad is subscribed thereto, and ten per cent. paid thereon in good faith, and in cash to the directors named in said articles of association; and that it is intended in good faith to maintain and operate the road mentioned in said articles of association.

JOHN MAGEE.
R. B. VAN VALKENBURGH.
D. RUMSEY.

Subscribed and sworn to this 16th day of May, 1854, before me.

A. D. READ,
Justice of the Peace, Steuben County.

252 STATE OF NEW YORK,
Secretary's Office:

I have compared the foregoing copy of the articles of association of the Blossburgh and Corning Railroad Company, and affidavits and certificates thereto annexed, with the originals thereof, filed and recorded in this office May 19, 1854, and certify the same to be a correct transcript therefrom, and of the whole of said articles, affidavits, and certificates.

Given under my hand and seal of office at the city of Albany this 22d day of May, 1854.

A. G. JOHNSON,
Dep. Sec. of State.

Which evidence was objected to by counsel for defendant as follows: That from the recitals in the articles of association the organization of the plaintiffs was unauthorized; and that their association as such corporation was not in conformity to the laws of this State. The said referee overruled the objections, and the said exemplified copy-articles was read in evidence, to which decision defendants, by their counsel, excepted.

The plaintiff's counsel next read in evidence the agreement, of which the following is a copy, (the execution thereof being admitted,) to wit:

A.

It is mutually agreed by and between the Corning and Blossburg Railroad Company, of the State of New York, of the one part, and the Tioga Railroad Company, of the State of Pennsylvania, of the other part, as follows: The said Corning and Blossburg Railroad Company agree to use all due exertions to have the track of their railroad relaid with heavy iron rails, similar to those in use on the New York and Erie Railroad, or of the pattern called the continuous rail, such as is manufactured by J. F. Winslow, of Troy, and to maintain and keep the same in repair when so relaid.

253 The said Corning and Blossburg Railroad Company further agree to furnish, free of charge, for the use of the said Tioga Railroad Company suitable grounds in the village of Corning for the necessary depots, machine-shops, and engine-houses, with sufficient grounds at or near the depot of the New York and Erie Railroad, and also upon the river-front at some convenient point, and necessary facilities for the business of the railroad of the said companies, not including the coal and lumber business of the Tioga Railroad Company, and also free of charge to erect, maintain, and keep in repair the necessary depots, machine-shops, and engine-houses at suitable and proper places upon the ground so to be furnished, and also to erect, maintain, and keep in repair the necessary water-stations and apparatus at suitable points between Corning and the State line; and it is further understood and agreed that the principal repairs of engines, cars, &c., shall be made at the machine-shops, &c., so to be erected at the village of Corning.

The said Tioga Railroad Company agree, on their part, to use all due diligence to have the track of their railroad from Blossburgh to the State line relaid with heavy iron rails of the description of one of the kinds above specified, and to maintain and keep the same in repair when so relaid.

The said Tioga Railroad Company also agree that when the track of the said railroad shall be completely relaid, and the depots, machine-shops, engine-houses, water-stations and apparatus built and ready for use as above provided, they will purchase from the owners of the same the locomotives, machinery, and cars now in use on the railroad of the said companies, at a cash valuation to be made by disinterested persons, each party choosing one; and in case such persons cannot agree they to be at liberty to choose a third, and to pay for the same in the preferred certificates of loans of the said Tioga Railroad Company, bearing seven per cent. interest.

254 The said Tioga Railroad Company further agree that, when the said railroads shall be relaid and ready for use as aforesaid, they will operate the same from Corning to Blossburgh for the purpose of transporting passengers, mails, coal, lumber, merchandise, and such other freight as shall be furnished for transportation upon the said rail-

roads, and for that purpose shall furnish, and provide, maintain, and keep in repair the necessary motive-power, engines, machinery, and cars, (nevertheless they shall not be bound to furnish coal-cars,) for all the regular business that shall be furnished to the said railroad; uniform rates of tolls and charges for the transportation of passengers, mails, and freight on and upon the said railroads shall be established annually by the mutual agreement of the said companies; and in case of disagreement between them, such rates of tolls and charges shall be settled by disinterested persons, each party choosing one, and in case such persons cannot agree, they to be at liberty to choose a third; and for the use of the said railroad of the said Corning and Blossburgh Railroad Company, and the use of their depots, engine-houses, machines-shops, grounds, water-stations, &c., the Tioga Railroad Company agree to pay to the Corning and Blossburgh Railroad Company two-thirds of all receipts for passengers, mails, and freight, which shall be taken for the said Corning and Blossburgh Railroad, (the expenses charged customers for the loading and unloading coal, lumber, and other freights, and for warehousing, and such additional charges by way of discrimination as shall be made for short distances for motive-power, not to be included in the term receipts as above mentioned.) Payments for all cash business to be made at the expiration of each and every month from the commencement of this agreement, and of all other amounts within thirty days from the expiration of each and every month as afore-
255 said; and the said Tioga Railroad Company are to furnish to the said Corning and Blossburgh Railroad Company way-bills of all the passengers, freights, &c., passing over said road during each and every month at the expiration thereof.

It is understood and agreed that the foregoing arrangement for operating and running the said railroad shall continue for ten years after the said railroad shall be relaid and ready for use. It is further mutually agreed, subject however to the ratification by the directors of the Tioga Railroad Company, that the said Corning and Blossburgh Railroad Company, and the said Tioga Railroad Company, shall each relay their road on cross-ties of sufficient length to allow an alteration of the track to a *guage* of six feet in width, but the said railroads are to be relaid and opened for use on a four feet eight and a half inch gauge, and should the board of directors of the Tioga Railroad Company desire the width of the *guage* of the two roads altered to the width of six feet, the Corning and Blossburgh Railroad Company and the Tioga Railroad Company shall, at any time after the expiration of twelve months from the time said railroads shall be relaid, as hereinbefore provided, alter the track to a six-feet gauge; and it is agreed that the said alteration from a four feet and one half-inch to a six-feet gauge shall be made as soon as practicable by the Corning and Blossburgh Railroad Company after the board of directors of the Tioga Railroad Company shall notify the said Corning and Blossburgh Railroad Company of their desire that such alteration shall be made: Provided that the Tioga Railroad Com-
pany have purchased the locomotives, cars, and machinery now
256 in use on the said roads from the parties holding them, and paid

for the same in the preferred certificates of loan, bearing seven per cent. interest, as hereinbefore provided.

Dated July 29, 1851.

CORNING AND BLOSSBURGH RAILROAD COMPANY,
By H. W. BOSTWICK.

TIOGA RAILROAD COMPANY,
By JOSEPH W. RYERSS,
A. E. DOUGHERTY,
W'M E. MORRIS.
COFFIN CALKET,
By A. E. DOUGHERTY, *Att'y.*
Committee on Consolidation.

Also, the agreement of which the following is a copy, (the execution thereof being admitted,) to wit:

B.

(Copy.)

Whereas on the 29th day of July, A. D. 1851, the Corning and Blossburgh Railroad Company, of one part, and the Tioga Railroad Company, of the other part, made and entered into an agreement for the relaying the tracks of their respective railroads and the rebuilding of the necessary depots, machine-shops, and engine-houses, and for operating the said railroads, as by said contract, reference being had thereto, will more fully appear; and whereas differences have arisen to the same, and the said parties have agreed to modify the same, as hereinafter specified: Now, therefore, this agreement witnesseth, that the said Tioga Railroad Company agree to take the railroad of the said Corning and Blossburgh Railroad Company, in its present condition, to slope surface, ditch, complete and finish the same, and do everything necessary to fit the same for use according to the terms and conditions of said contract. The said Tioga Railroad Company further agrees
257 to put in a proper and fit condition for use all the water-stations on the railroad of the said Corning and Blossburgh Railroad Company west of Corning. The said Tioga Railroad Company further agree, after the iron shall be laid on the same, to slope surface, ditch, and finish in a proper and suitable manner the turnouts and branches of the said Corning and Blossburgh Railroad, on the line of the same and at the village of Corning. The said Corning and Blossburgh Railroad Company agree to construct two turnouts on the line of the said railroad, at such places as the said Tioga Railroad Company shall direct, but the said Tioga Railroad Company shall pay any additional expense of grading which shall be incurred in consequence of any change of present locations. The said Corning and Blossburgh Railroad Company also agree to fix and put in proper condition their water-tanks at the village of Corning. The said Corning and Blossburgh Railroad Company further agree to continue the track of their railroad so as to connect with the branches of the Buffalo, Corning and New York, and New York and Erie, railroads, below the village of Corning, and also to complete and finish the depots, machine-shops and engine-houses, and the necessary tracks to and through the same, with a turn-table or an "Y" for the purpose of turning engines. In consideration of the completing and finishing the said railroad of the Corning and Blossburgh

Railroad Company, as hereinbefore specified, the said Tioga Railroad Company are to receive three hundred dollars per mile, to be reserved out of the first earnings of the said Corning and Blossburgh Railroad under said contract, and the length of said railroad, for the purpose of determining said compensation, as well as the compensation for repairs, hereinafter specified, is hereby fixed at fifteen miles. The said Corning and Blossburg Railroad Company further agree to secure the bank on the river side, at or near the point of the hill above the village
258 of Corning, by sloping and riprapping the said bank, and also the bank at or near Ryerss' Eddy, by piles and brush and stones, the sufficiency of the same, if, when completed, not satisfactory to the Tioga Railroad Company, to be determined by H. Brewer and P. Janet, or by an umpire chosen by them, in case of their disagreement. The Tioga Railroad Company further agrees, when the track and branches of the said Corning and Blossburg Railroad shall be completed and furnished, as hereinbefore specified, to keep and maintain the same in good condition and repair during the continuance of said contract; in consideration of which, the said Tioga Railroad Company shall receive two hundred and fifty dollars per mile per annum, to be reserved in equal monthly payments out of the earnings of said Corning and Blossburg Railroad Company during the continuance of said contract as aforesaid. The Tioga Railroad Company further agree to build and maintain, on each side of the said Corning and Blossburg Railroad, all fences which shall be necessary, for which the said Tioga Railroad Company shall receive seventy-five cents per rod for all fences they shall so build, to be reserved out of the said earnings of the said Corning and Blossburg Railroad, and which sum of seventy-five cents per rod is to cover the building and maintaining the same during the continuance of said contract.

Dated Corning, October 23, 1852.

(Signed) HIRAM W. BOSTWICK,
President of the Corning and Blossburg Railroad Company.
JOSEPH W. RYERSS,
President of the Tioga Railroad Company.

Also the agreement of which the following is a copy, (the execution of which was admitted,) to wit:

C.

CORNING, *January* 15, 1853.

It is hereby agreed that the Tioga Railroad Company will se-
259 cure the bank at or near Ryerss' Eddy, by gravel, stones, and riprapping, for the sum of twelve hundred dollars, to be paid out of the earnings of the Corning and Blossburg Railroad Company, as provided in the annexed contract for the completion of the Corning and Blossburg Railroad, the said Corning and Blossburg Railroad Company being released from any liability for or on account of said work at Ryerss' Eddy.

(Signed) HIRAM W. BOSTWICK,
President of the Corning and Blossburg Railroad Company.
A. E. DOUGHERTY,
Secretary and General Agent of the Tioga Railroad Company.

Counsel for plaintiffs next offered in evidence an assignment, of which the following is a copy, (the execution thereof being admitted,) to wit:

D.

Whereas by a certain agreement made the 29th day of July, 1851, between the Corning and Blossburg Railroad Company and the Tioga Railroad Company, and a further agreement modifying the same, made between the same parties on the 23d day of October, 1852, the said Tioga Railroad Company, among other things, agreed to stock and run the railroad of the Corning & Blossburg Railroad Company, in connection with the Tioga Railroad, for the term of ten years; and whereas the Corning and Blossburg Railroad Company hold a lease from Corning and Fellows, dated 28th May, 1853, for certain lands in Corning, to be used in connection with the running of said roads, which said contract and lease were, on the 23d day of November, 1853, duly assigned to John Magee as collateral security for the payment of certain
260 money, due from the Corning and Blossburg Railroad Company to said Magee; and whereas the land and premises on which the road-track of said company is located, with the road fixtures and appurtenances thereon and thereto belonging, were, on the 31st day of December, 1852, sold by the sheriff of the county Steuben, by virtue of a judgment and execution against said company, and at such sale were bid off by said John Magee, and the time during which said company had the right to redeem the same from said sale as judgment-debtors has expired, and the same have not been redeemed by said company:

Now, therefore, in consideration of the premises, and of an agreement this day executed by said Magee to carry out and perform the said contracts and lease on the part of said Corning and Blossburgh Railroad Company, and to secure the running and operating of the railroad of said company, and in good faith, so far as may be, to place said John Magee in a situation where he may fully carry out and perform the said contract and lease, so far as the performance depends upon the said Corning and Blossburgh Railroad Company, and thus secure to the Tioga Railroad Company all the rights, benefits, and privileges to which they may be entitled under said contracts, the said Corning and Blossburg Railroad Company do hereby sell, assign, transfer, and set over to the said John Magee, subject to assignment hereinbefore mentioned, the said several contracts with the Tioga Railroad Company, and all the right and interest which the said Corning and Blossburgh Railroad Company have in the same, so far as relates to the running and operating of the said railroad, and also the said lease, so made as aforesaid, with the said Corning and Fellows. And for the purpose of enabling the said Magee to enforce the said contracts, the said Corning and Blossburgh Railroad Company has constituted and appointed, and by these
261 presents do hereby constitute and appoint the said John Magee their true and lawful attorney irrevocable to demand, receive, and collect all moneys due, and to grow due, upon said contracts, and to enforce said contracts by all lawful ways and means, and to carry out and perform the same on the part of the said Corning and Blossburgh Railroad Company as fully and perfectly as the said company might or could do were these presents not executed, with full power of substitution and revocation, hereby ratifying and confirming all that the said attorney or his substitute shall lawfully do, or cause to be done, by virtue hereof.

In witness whereof the said company have caused these presents to be subscribed by their secretary, and their corporate seal to be affixed this 22d day of March, 1854.

[L. S.] W'M M. MALLORY, *Secretary.*

STEUBEN COUNTY, *ss:*

On the 22d day of March, 1854, before me personally came William M. Mallory, secretary of the Corning and Blossburgh Railroad Company, to me known, who, being by me duly sworn, did depose and say that he resides in the village of Corning, in said county; that he was the secretary of the Corning and Blossburgh Railroad Company; that he knew the corporate seal of said company; that the seal affixed to the foregoing instrument in writing was such corporate seal; that it was so affixed by order of the board of directors of the said company, and that he signed his name thereto by the like order as secretary of said company.

D. F. BROWN,
Justice of the Peace.

Which assignment was objected to by counsel for defendants
262 that such assignment was unauthorized; that the Corning and Blossburgh Railroad Company had no right or authority of law to make the same, and that it was without any lawful consideration; which objection was overruled by the referee, and said assignment was given in evidence; to which decision defendants, by their counsel, excepted.

Counsel for plaintiffs next offered in evidence what purported to be a copy resolution of the Corning and Blossburgh Railroad Company, of which the following is a copy, to wit:

E.

At a meeting of the directors of the Corning and Blossburgh Railroad Company, held at their office at the Bank of Corning, in Corning, Wednesday, March 22d, 1854. Present, L. Mallory, James H. Gulick, Geo. T. Spencer, S. F. Denton, W. M. Mallory.

L. Mallory, esq., was chosen president pro tem.

On motion of Geo. T. Spencer, esq., the following resolution was unanimously adopted:

Whereas by a certain agreement made the 29th day of July, 1851, between the Corning and Blossburgh Railroad Company and the Tioga Railroad Company, and a further agreement modifying the same made between the same parties on the 23d day of October, 1852, the said Tioga Railroad Company agreed to stock and run the railroad of the Corning and Blossburgh Railroad Company for the term of ten years; and whereas the Corning and Blossburgh Railroad Company held a lease from Corning and Fellows, dated 28th May, 1853, for certain lands in Corning to be used in connection with running of said road, which said contracts and lease were, on the 23d day of November, 1853, duly asssiged
263 to John Magee as collateral security for the payment of certain money due from the Corning and Blossburgh Railroad Company to said Magee; and whereas the land and premises on which the road-track of said company was located, with the road, fixtures, and appurtenances thereon and thereto belonging, was, on the 31st day of December, 1852, sold by the sheriff of the county of Steuben, by virtue of a judgment and execution against said company, and at such sale were bid off by said John Magee, and the time during which the said company had the right to redeem the same from said sale as judgment-debtors has expired, and the same has not been redeemed by said company: Now, therefore, to secure the running and operating of the railroad of the said company, and in order in good faith, so far as may be,

to place the said John Magee in a situation where he may fully carry out and perform the said contracts, so far as the performance thereof depends upon this company, and thus to secure to the Tioga Railroad Company all the rights, benefits, and privileges to which they may be entitled under said contract, it is—

Resolved, That the secretary of this company execute, under the seal of the company, and deliver to the said John Magee, an assignment of all the rights and interest which this company now has in and to the said several contracts with the Tioga Railroad Company, so far as relates to the running and operating of said road, and the said lease so made by the said Corning and Fellows as aforesaid, with a power of attorney irrevocable to said Magee, authorizing him to enforce said contract by all lawful ways and means, provided the said John Magee shall execute and deliver to this company his agreement, that if he shall acquire the title to said lands, premises, and road-track under such sale or otherwise, that he will fully perform all the agreements in said
264 contracts contained, on the part of this company, hereafter to be performed and kept.

(Signed) L. MALLORY, *P't pro tem.*
W. M. MALLORY, *Secretary.*

Counsel for defendants objected to such resolution being given in evidence, on the grounds that the book in which such resolution was entered should be produced.

The counsel for plaintiffs then proved by the testimony of Geo. T. Spencer, esq., one of the directors of such company, that he was present at a meeting of the directors on 22d of March, 1854, and recollect' the passage of the resolution now shown to me. It is the original resolution as it was passed. On his cross-examination the witness stated that no minutes have been recorded in any book since 1848. When anything was done in the meetings it was kept on separate pieces of paper, and that such resolution was not entered in any book.

Plaintiff's counsel next offered in evidence, the assignment of which the following is a copy, (the execution thereof being admitted,) to wit:

F.

Whereas, by a certain agreement, made the 29th day of July, 1851, between the Corning and Blossburg Railroad Company and the Tioga Railroad Company, and a further agreement modifying the same, made between the same parties on the 23d day of October, 1852, the said Tioga Railroad Company, amongst other things, agreed to stock and run the railroad of the Corning and Blossburg Railroad Company in connection with the Tioga Railroad, for the term of ten years;

And whereas, on the 28th day of May, 1853, a lease was made
265 by Corning and Fellows to the Corning and Blossburg Railroad Company for certain lands in Steuben County, to be used in connection with the running of the said railroads; and whereas the said contracts and lease were, on the 22d day of March, 1854, duly assigned by the said Corning and Blossburg Railroad Company to the undersigned John Magee, of Bath, Steuben County, New York, as by reference to said assignment will more fully appear; and whereas the Blossburgh and Corning Railroad Company have become, by purchase, the owners of the railroad heretofore owned by the Corning and Blossburgh Railroad Company, and have agreed to carry out and perform in all things the provisions in said contracts and lease contained, to be performed on the

part of the said Corning and Blossburgh Railroad Company: Now, therefore, in consideration of the premises and of the sum of ten dollars to me in hand paid by the Blossburgh and Corning Railroad Company, the receipt of which is hereby acknowledged, I do hereby sell, assign, transfer, and set over to the said Blossburg and Corning Railroad Company all my right, title, and interest of, in, and to the said above-recited contracts with the said Tioga Railroad Company, and also to the said lease so as aforesaid made with the said Corning and Fellows; and for the purpose of enabling the said Blossburg and Corning Railroad Company to enforce the said contracts, I do hereby constitute and appoint the said Blossburg and Corning Railroad Company my true and lawful attorneys irrevocable, to demand, receive, and collect all money hereafter to become due and payable under and by virtue of said contracts, by all lawful ways and means, and to carry out and perform the same as fully as the said Corning and Blossburg Railroad Company or myself might or could do by virtue of said contracts and said assignment thereof so made to me as aforesaid: Provided, however, that nothing
266 herein contained shall be so construed as to entitle the said Blossburg and Corning Railroad to all or any portion of the money which had accrued and become payable under and by virtue of said contracts, on or before the first day of June, one thousand eight hundred and fifty-four; but the same and the right to collect the same, as may be necessary, are herecy expressly saved and reserved from the effect of this assignment.

In witness whereof the said John Magee hath hereunto set his hand and seal this thirteenth day of June, A. D. 1854.

[L. S.] (Signed) JOHN MAGEE.

Acknowledged before N. Sawyer, J. P., 13th June, 1854.

To which assignment defendant's counsel objected, as follows: That such assignment conferred no right or authority in the plaintiffs to claim under the same; that Magee had no lawful right, claim, or interest in the agreements specified.

The referee overruled the objection and received the assignment in evidence; to which decision defendants, by their counsel, excepted.

The plaintiff's counsel next gave in evidence a tariff of rates, both for freight and passengers, of which the following are copies, to wit:

Names of the freight-stations on the railroad.	Distance in miles from Corning.	Rates in cents per 1,000 ft B. M. for lumber transported by Tioga R. R. Co.	Rates in cents per 100 lbs. for articles transported by Tioga R. R. Co., in classes, to and from Corning.	
			1st class.	2nd class.
Erwin Centre	8¼	60	8	6
Cook's Turnout	11½	65	9	7
Lindleytown	12½	75	9	7
Lawrenceville	15	85	9	7
Somers' Lane	17½	95	10	8
Mitchell's	20	1 00	11	9
Tioga O. Station	21	1 05	11	9
Berry's Bridge	23	1 10	11	9
Mill Creek	25	1 20	13	11
Kelly's Mill	30	1 25	13	11
Mansfield	31	1 30	14	12
Covington	36	1 40	15	13
Blossburgh	41	1 50	16	14

Coal going north same rates as last year. This schedule of rates adopted, by mutual agreement of both parties, for one year, commencing March 1st, 1854.

(Signed) H. W. BOSTWICK,
P't of C. & B. R. R. Co.
JOHN MAGEE,
Assignee of Lease.
J. O. STEARNS, *P't.*

	Erwin Cen're.	Lindleytown.	Lawrenceville.	Somers' Lane.	Mitchell's.	Tioga, O. Station.	Berry's Bridge.	Mansfield.	Covington.	Blossburg.
Corning	25	40	45	55	60	65	70	95	100	125
E. Centre	.....	15	20	30	35	40	45	70	85	100
Lindleytown	.....	.....	10	20	25	30	35	60	75	90
Lawrenceville	.....	.....	.....	10	15	20	25	50	65	80
Somers' Lane	.....	.....	.....	.....	10	15	20	45	60	75
Mitchell's	.....	.....	.....	.....	.....	10	10	35	50	65
Tioga, O. Station	.....	.....	.....	.....	.....	.....	10	30	45	60
Berry's Bridge	.....	.....	.....	.....	.....	.....	.....	25	40	55
Mansfield	.....	.....	.....	.....	.....	.....	.....	.....	15	30
Covington	.....	.....	.....	.....	.....	.....	.....	.....	.....	15

This schedule of rates adopted by mutual agreement of both parties for one year, commencing March 1st, 1854.

(Signed) H. W. BOSTWICK,
P't C. & B. R. R. Co.
JOHN MAGEE,
Assignee of Lease.
J. O. STEARNS, *for P't.*

268 It was admitted by counsel for the respective parties that the foregoing tariff of rates remained the same for at least one year from the date of the statement, and that the freight charged on coal was $1 per ton from Blossburg to Corning. It was admitted that the defendant had run the roads during the time claimed for in the complaint, and had received the earnings therefrom, and that the road had earned money.

Counsel for plaintiff next proved that this action was commenced February 14, 1855.

GEORGE T. SPENCER was then examined as a witness for plaintiff, and testified:

I was a director of the Corning and Blossburg Railroad Co. in March, 1854. I have a general recollection of a meeting of the directors, but do not recollect the date. I have seen the resolution which has been put in evidence. It is the original, as it was adopted. I didn't write it; was present at a meeting Nov. 23d, 1853. The resolution now shown me is in my handwriting. I recollect it; it is the original resolution, and it was passed at that meeting. I recognize the seal to the assignment of Mallory as secretary to Magee. H. W. Bostwick was president, (the assignment referred to was the one before given in evidence.) H. W. Bostwick was president of the company in 1853, and for several years before that time. His signature to the assignment, dated 23d November, 1853, is genuine, and the seal attached thereto is the seal of the company.

On his cross-examination the witness testified:

I was first elected a director of the Corning and Blossburgh Railroad Co. in May, 1847; the last time in July, 1853, I believe. I think this company had no seal till 1852—1853. I was aware of the sale of the road on execution in Dec., 1852.

The plaintiff then gave in evidence the resolution of the direc-
269 tors of the Corning and Blossburgh Railroad Company passed 23d November, 1853, of which the following is a copy:

H.

At a meeting of the directors of the Corning and Blossburgh Railroad Company, held at the bank of Corning, November 23d, 1853, L. Mallory was elected pres't prot., the pres't being absent: present, L. Mallory, W. B. Whiting, Geo. T. Spencer, S. F. Denton, W. M. Mallory. The annexed resolution was unanimously adopted.

L. MALLORY, *Pres't Prot.*

CORNING, *Nov.* 23, 1853.

W. M. MALLORY, *Sec'y.*

Whereas John Magee has heretofore loaned to this company the sum of $25,000 in money, to secure the payment of which this company executed to him their bond and mortgage, bearing date on the 29th day of Nov., 1852, payable one-half in 12 months, and one-half in 24 months, from the first day of January, 1853, with interest payable semi-annually, as is provided in said bond and mortgage; and whereas the said company will not have the funds or the ability to pay the first installment of the principal, when the same becomes due; and whereas the said Magee has proposed to extend the time for the payment of the first installment beyond the first day of January next, upon condition that this company give further security by assigning to him so much of a certain contract executed by and between this company and the Tioga Railroad Company, bearing date on the 29th day of July, 1851, as relates to the running of the Corning & Blossburgh Railroad Company for ten years, and a further contract supplementary thereto, bearing date on the 23d day of October, 1852; also a certain lease executed
270 to and with this company by Joseph Fellows and Erastus Corning, bearing date on the 28th day of May, 1853, for the use and occupancy of certain lands therein described; and whereas this board deem it reasonable and proper that the said Magee have further security: It is hereby resolved that the president be, and he is hereby, authorized and directed to execute and deliver to the said Magee a proper assignment of the said contract and lease, to be held by him until the said sum of $25,000 shall have been fully paid and satisfied.

271 The plaintiff then gave in evidence an assignment, of which the following is a copy:

This indenture made the 23d day of November, 1853, between the Corning and Blossburg Rail Company of the first part, and John Magee, of Bath, in county of Steuben and State of New York, of second part, witnesseth, that the said parties of the first part, in consideration of the sum of one dollar to them paid by the party of the second part, the receipt whereof is hereby acknowledged, and for the purpose of further securing the payment of the sum of twenty-five thousand dollars, according to the condition of a certain bond executed by the party of the second part, bearing date the 29th day of November, 1852, and the

mortgage, bearing the same date, accompanying the said bond, have sold, transferred, and assigned, and, by these presents, do sell, transfer, and assign to the said party of the second part, so much of a certain contract executed by and between the said parties of the first part and the Tioga Railroad Company, as relates to the running of the Corning & Blossburg Railroad for the term of ten years; and a further
272 contract supplementary thereto, bearing date the 23d day of October, 1852; also a certain lease executed to and with the said parties of the first part by Erastus Corning & Joseph Fellows, bearing date the 28th day of May, 1853, for the use and occupancy of certain lands therein described: To have and to hold the said contract and lease to the said John Magee, his heirs, executors, administrators, and assigns forever: Provided, however, that if the said parties of the first part shall well and truly pay or cause to be paid to the said party of the second part, his executors, administrators, or assigns the money mentioned in the said bond and mortgage, with the interest due, & to grow due thereon, this assignment shall be void and of no effect, it being made for the purpose of securing the payment of the said bond and mortgage, as aforesaid. In witness whereof the company have caused these presents to be subscribed by their president and their corporate seal affixed the day and year first above written.

[L. S.) HIRAM W. BOSTWICK,
President of the Corning & Blossburg Railroad Company.

273 STEUBEN COUNTY, *ss:*

On this 3d day of December, 1853, before me personally came Hiram W. Bostwick, president of the Corning & Blossburg Railroad Company, to me known, who, being by me duly sworn, did depose and say that he resided in the village of Corning, in the said county; that he was the president of the Corning & Blossburg Railroad Company; that he knew the corporate seal of the said company; that the seal affixed to the foregoing instrument was such corporate seal; that it was so affixed by order of the board of directors of said Company, & that he signed his name thereto by the like order as president of said company.

D. F. BROWN,
Justice of the Peace.

274 The plaintiff also gave in evidence an agreement dated 22d March, 1854, between John Magee and the Corning & Blossburgh Company, of which the following is a copy:

I.

In consideration of an assignment this day made to me, John Magee, by the Corning and Blossburgh Railroad Company, of a certain agreement made the 29th day of July, 1851, between said Corning and Blossburgh Railroad Company, and the Tioga Railroad Company, and a further agreement modifying the same, made between the same parties on the 23d day of October, 1852, whereby the said Tioga Railroad Company agreed among other things to stock and run the railroad of the said Corning and Blossburgh Railroad Company for the term of ten years, and also of the assignment by said Corning and Blossburgh Railroad Company, to me, the said Magee, of a lease from Corning and Fellows to said Corning and Blossburgh Railroad Company, dated May 28th, 1853,

I, the said John Magee, do hereby promise, covenant and agree to and with the said Corning and Blossburgh Railroad Company, that in case I, the said Magee, shall acquire title to the railroad privileges and appurtenances of the said company, pursuant to a sale upon judgment
275 and execution made to me by the sheriff of Steuben county, December 31st, 1852, or otherwise, I will fully carry out and perform all the agreements and conditions of the said contracts between the said Corning and Blossburgh Railroad Company and Tioga Railroad Company, hereafter to be performed and kept on the part of the said Corning and Blossburgh Railroad Company, so far as relates to the running of the said railroad, and will also perform all the covenants, agreements, and conditions of said lease to be performed and kept on the part of said Corning and Blossburgh Railroad Company.

In witness whereof I have hereunto set my hand and seal the 22d day of March, one thousand eight hundred and fifty-four.

JOHN MAGEE.

Sealed and delivered in presence of—
[L. S.] (Signed) GEO. T. SPENCER.

STEUBEN COUNTY, *ss:*

On this 22d day of March, 1854, before me personally appeared John Magee, to me known to be the individual described in, and who executed the foregoing instrument in writing, and acknowledged that he had executed the same.

(Signed) D. F. BROWN,
Justice of the Peace.

It was admitted that notice of the assignment by the Corning and Blossburg Railroad Company to Magee, dated 22d March, 1854, and of the agreement of Magee to same company of same date, was served on the defendants on the 3d day of April, 1854. It was also admitted that notice of the organization of the plaintiffs, and also of the assignment by Magee to the plaintiffs was served on defendants on the 21st June, 1854.

276 The plaintiff here rested, with the understanding that the plaintiff was subsequently to give further evidence of the amount of his damages, if the same was not agreed upon by the parties.

The defendants, by their counsel, then moved the referee to nonsuit the plaintiffs, on the ground that no cause of action had been made out; that the plaintiffs were not a corporation legally organized; that they had no right or interest in the agreements given in evidence; that the assignment of those agreements to Magee was invalid; that the assignment by Magee, to the plaintiffs thereof, was invalid and insufficient; that there was no sufficient, nor any, proof of the plaintiff's right or title to the road or its earnings.

The referee denied the motion, and defendants, by their counsel, excepted.

The defendants, to maintain and prove the said issue on their part, called as a witness—

WILLIAM E. MORRIS, who, being sworn, testified:

I reside in Brooklyn; previously in Philadelphia. I was a director of the Tioga Railroad Company, defendants, and a kind of a consulting engineer; have been president and a director of railroads since 1843;

before then I acted as an engineer. I am a professional and practical engineer and surveyor, and have been since 1831. I was consulted in the making of this agreement of July 29, 1851, between the C. & B. R. R. Co. and the Tioga R. R. Co. I assisted in making the agreement. Mr. Colket and Mr. Ryerss also assisted on the part of the Tioga R. R. Co., and Col. H. W. Bostwick acted on behalf of the C. & B. R. R. Co. The agreement was made in Philadelphia.

(Counsel for defendants here offered to show by the witness what the parties to the agreement said at the time the agreement was made on the subject of discrimination for motive power—not to vary the
277 language of the agreement, but to show what they intended by the term or phrase, as inserted in the agreement. And the counsel stated that they should follow said proposition by proposing to show what was intended by the phrase or expression "discrimination for motive power for short distances.)

The referee held that if the defendants could show that the phrase or expression had a meaning, when applied to railroad matters, different from its ordinary and popular signification, the proposed explanation would be admissible in evidence by an expert; and the referee enquired of the witness whether the phrase or term "discrimination for motive power for short distances," had any meaning or signification in railroad matters different from its ordinary or common signification, without reference to railroad matters. The witness answered that he did not think it had, but he thought it a phrase persons would not be likely to understand. The referee then rejected the proposed evidence, and the defendant's counsel excepted.

Defendant's counsel then offered to show by the witness what the agreement in fact was at the time the written agreement was drawn up and signed, upon the ground that the language, as used in the written agreement, is ambiguous; which was also objected to by counsel for plaintiffs; which objection was sustained by the referee, and the offered testimony excluded, and defendants, by their counsel, excepted.

JOSIAH O. STEARNS was then sworn for defendants, and testified.

The tariff of rates put in evidence was fixed by myself as general agent of the Tioga Railroad Co., and John Magee and H. W. Bostwick, for the carriage of passengers and freights over the roads. The rates were fixed for the public, and were the published rates actually charged the public. No other tariff has ever been made.

278 On his cross-examination the witness testified:

I was general agent for defendants at Corning. We charged customers for loading and unloading freights and for warehousing, in addition to the rates stated in the tariff of rates.

The further hearing and trial of the cause was then postponed indefinitely. And on the 9th day of June, 1857, at Corning aforesaid, the parties, by their respective counsel, again appeared before the said referee, pursuant to notice; whereupon it was admitted by counsel for the respective parties, that two-thirds of all the receipts under the tariff of rates which had been put in evidence for all passengers, mails, and freights taken for the Corning and Blossburgh Railroad Company from June 1st, 1854, to January 1st, 1855, amounts to the sum of $34,829.89; that the defendants have paid of that sum to the plaintiffs the sum of $29,982.85, leaving the difference between the sum received and the sum paid, exclusive of mail-money which had been paid, and about which no question arises in this case, the sum of $4,847.04, upon which sum interest was to be computed from September 1st, 1854, in case the

referee should decide that the plaintiffs were entitled to recover the principal sum of $4,847.04, the amount of such difference.

ASAHEL BEERS was then sworn for the plaintiffs, and testified that he had gone through with the defendant's books, and that the sums above stated as received and paid were according to the books' debit and credit, and that the sum of $4,847.04 was the sum of the difference between, calculating the amount at the tariff of rates paid for through-rates from Corning to Blossburg and Blossburg to Corning, pro rata, and a calculation at the tariff of rates paid from the station at which the shipment was made to the station of delivery, allowing to the plaintiff two-thirds of the amount received for transporting over the
279 Corning and Blossburg Railroad; and when the article was taken some distance over both roads, allowing to the plaintiffs two-thirds of the amount received for transporting it over the Corning and Blossburg Railroad, at the same average rate per mile received for transporting over both roads for the distance it was actually transported over both roads from the first of June, 1854, to first of January, 1855.

Counsel for defendants here proposed and offered to prove by Amos Stearns, the agent of the defendants in charge of their business of running the roads, that the sum of the difference between through rates from Corning to Blossburg, and intermediate rates from station to station, was reserved by the defendants under the assignments before given in evidence for discrimination for motive power for short distances, which was objected to by counsel for plaintiffs on the ground that it was immaterial, and that the claim of the defendants to any of its own agents or others than the plaintiffs would not affect the rights of the plaintiffs under the agreement. The objection was sustained by the referee, to which decision defendants, by their counsel, excepted. It was admitted that above amount of difference did not include anything for loading or unloading coal, lumber, etc., or for warehousing.

The testimony here closed.

The said referee afterwards, on the 20th day of August, 1857, made and delivered his report in writing of which the following is a copy, to wit:

Supreme court.

THE BLOSSBURG AND CORNING RAILROAD COMPANY
against
THE TIOGA RAILROAD COMPANY.

I, Daniel S. Dickinson, the referee appointed in this action, having
280 heard the proofs and allegations of the parties, and duly deliberated thereon, do find the following as the facts in the case:

1. That the plaintiffs are a corporation duly organized under and according to the laws of the State of New York.

2. That the defendants are a foreign corporation duly organized under and by virtue of the laws of the State of Pennsylvania.

3. That the said defendants, on the 29th day of July, 1851, and the Corning and Blossburg Railroad Company, a corporation duly organized under the laws of the State of New York, made and executed the agreement of the date last aforesaid, as stated and set out in the complaint, and that the same parties also made and executed the two several

agreements as stated in the complaint, bearing date respectively on the 23d day of October, 1852, and the 15th day of January, 1853.

4. That on the 22d day of March, 1854, the said Corning and Blossburg Railroad Company duly assigned the said contract above mentioned to John Magee as stated in the complaint, and that on the 13th day of June, 1854, the said John Magee duly assigned the said contract to the plaintiffs in manner and form as is stated in the complaint, saving and reserving to said Magee all moneys which had become due and payable thereon or before the first day of June, 1854; that the defendant had notice of such assignments, and that the plaintiffs are still the owners of said contract.

5. That the tracts of said railroad were relaid, and the works done thereon as provided for in said contract, and that the defendants had for a long time before the assignment of said contract by Magee to the plaintiffs, and had ever since, run and operated the said Corning and Blossburgh Railroad under the terms and provisions of said contract as is charged in the complaint.

281 6. That two-thirds of the receipts by the defendants for passengers, mails, and freights taken for the said Corning and Blossburgh Railroad Company, under and according to the terms and provisions of the said contract between the first day of June, 1854, and the first day of January, 1855, amounts to thirty-four thousand eight hundred and twenty-nine dollars and eighty-nine cents ($34,829.89) over and above all sum which the defendants were entitled to retain under the provision of said contract, of which *the* sum the defendants have at different times paid to the plaintiffs the sum of twenty-nine thousand nine hundred and eighty-two dollars and eighty-five cents, ($29,982.85,) leaving a balance due from the defendants to the plaintiffs of four thousand eight hundred and forty-seven dollars and four cents, ($4,847.04.) and it was admitted by the parties on the trial that the balance found due the plaintiffs should have interest from the first day of Sept., 1854, which interest of this date amounts to the sum of ten hundred and seven dollars and fifty cents, ($1,007.50.) And I do further find on a conclusion of law that the defendants are indebted to the plaintiffs in this action in the sum of five thousand eight hundred and fifty-four dollars and fifty-four cents, ($5,854.54,) which sum the plaintiffs are entitled to recover of the defendants in this action with costs.

D. S. DICKINSON.

Dated 20 Aug., 1857.
Referee's fees, $69.00.

Supreme court.

THE BLOSSBURGH & CORNING RAILROAD COMpany
against
THE TIOGA RAILROAD COMPANY.

SIR: Take notice that the above-named defendant appeals to
282 the general term of this court from the judgment entered in this action on the 16th day of September, 1857, in the office of the clerk of Steuben County, in favor of the above-named plaintiff against the above-named defendant, for the sum of $6,106.69, recovery and costs.

Dated October 13, 1857.

JOHN MAYNARD,
Defendant's Attorney.

To R. B. VAN VALKENBURGH, esq., *Plaintiff's Attorney*, and SAMUEL M. ALLEY, *Clerk*, &c.

(Endorsed:) Supreme court. The Blossburgh & Corning Railroad Company against The Tioga Railroad Company. Notice of appeal. John Maynard, defendant's attorney. To R. B. Van Valkenburgh, esq.

Supreme court.

At a general term of the supreme court held at Rochester, Monroe County, on the 17th day of December, 1858: Present, Hon. Henry Wells, E. Darwin Smith, Thomas A. Johnson, justices.

THE BLOSSBURGH AND CORNING RAILROAD COMPANY *against* THE TIOGA RAILROAD COMPANY.

D. RUMSEY.
W'M IRVINE.

Judgment affirmed. (A copy.)

J. CUTTER, *Dep. Clerk.*

283 (Endorsed:) Supreme court. The Blossburg & Corning Railroad Company against The Tioga Railroad Company. Order of affirmance. R. B. Van Valkenburgh, plaintiff's attorney.

I admit due service upon me of a copy of within order. Dec. 27th, 1858.

Filed January 3d, 1859.

Supreme court.

THE BLOSSBURG & CORNING RAILROAD COMPANY, respondents, *against* THE TIOGA RAILROAD COMPANY, APPELLANTS.

Judgment, Feb. 1st, 1859.

This cause having been brought before the general term of this court on appeal from a judgment entered therein in the supreme court, on the 16th day of September, 1857, on the report of Hon. Daniel S. Dickinson, the referee in this action, in favor of the said "The Blossburgh & Corning Railroad Company" against the said "The Tioga Railroad Company," for the sum of six thousand one hundred and six dollars and twenty-three cents, and the said appeal having been duly heard and the decision of the court thereupon been duly filed and entered, whereby the said judgment is in all things affirmed:

On motion of R. B. Van Valkenburgh, attorney for the said plaintiffs, it is adjudged that the said judgment be, and the same is hereby,
284 in all things affirmed, and it is also adjudged that the said plaintiffs recover of the said defendants the sum of seventy-four dollars and ten cents, their costs and disbursements.

O. J. AVERELL, *Dep. Clerk.*

(Endorsed:) Supreme Court. The Blossburgh & Corning Railroad Company, respondents, against The Tioga Railroad Company, appellants.

Judgment-roll in affirmance. R. B. Van Valkenburgh, plaintiff's attorney. Costs, $74.10. Filed Feb. 1st, 1859—11 a. m.

STATE OF NEW YORK,
Steuben County, Clerk's Office, ss:

I, Samuel M. Alley, clerk of said county, and of the supreme courts of said State, held in and for said county, do hereby certify that I have compared the foregoing copy of a notice of appeal, judgment-roll, and of the endorsements thereon, with the originals of the same now remaining on file in this office, and that they are correct transcripts therefrom, and of the whole of said originals.

Witness my hand and seal of office, hereto attached, this 21st day of March, 1859.

[L. S.] S. M. ALLEY, *Clerk.*

STATE OF NEW YORK,
Steuben County, Clerk's Office, ss:

The foregoing is my return to the court of appeals made this 21st day of March, 1859.

Fees, $8.50.

S. M. ALLEY, *Clerk.*

Filed Oct. 8, 1859.

285 STATE OF NEW YORK, *ss:*

Pleas in the court of appeals, held at the capitol, in the city of Albany, on the 8th day of April, in the year of our Lord one thousand eight hundred and sixty-four, before the judges of said court. Witness Hiram Denio, esquire, chief judge.

[L. S.] F. A. TALLMADGE, *Clerk.*

THE BLOSSBURG AND CORNING RAILROAD Company, respondents,
against
THE TIOGA RAILROAD COMPANY, APPELLANTS.

Be it remembered that, on the 8th day of October, in *in* the year of our Lord one thousand eight hundred and fifty-nine, the Tioga Railroad Company, the appellant in this action, came here into the court of appeals, by John Maynard, its attorney and counsel, and filed in the said court its notice of appeal and return thereto from a judgment of the supreme court.

And the Blossburgh and Corning Railroad Company, the respondents in said action, afterwards appeared in said court of appeals, by R. B. Van Valkenburgh, its attorney and counsel, which said notice of appeal and return thereto filed as aforesaid are hereunto annexed.

Whereupon the said court of appeals, after having heard this action argued by Mr. J. H. Reynolds and Mr. A. S. Johnson, counsel for the appellant, and Mr. D. Rumsey and J. K. Porter, counsel for the respondent, and, after due deliberation having been had thereupon, did order and adjudge that the judgment of the supreme court appealed from in this action be in all things affirmed. And it was further ordered and adjudged that the respondent recover against the appellant costs of appeal in this court.

286 It is also ordered that the record and proceedings be remitted to the supreme court, there to be proceeded upon according to law.

Therefore it is considered that the said judgment be in all things affirmed, with costs as aforesaid, and stand in full force, strength, and effect.

And hereupon, as well the notice of appeal and return thereto aforesaid as judgment of the court of appeals as aforesaid by them given in the premises, are by the said court of appeals remitted into the supreme court of the State of New York, before the justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said supreme court, before the justices thereof, etc.

CORS. TEN BROECK,
Deputy Clerk.

COURT OF APPEALS, CLERK'S OFFICE,
Albany, April 13, 1864.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said action in the court of appeals, with the papers originally filed therein attached.

Fees, $4.75.

CORS. TEN BROECK,
Deputy Clerk.

Filed in Steuben County clerk's office, April 26, 1864.
O. J. AVERELL, *Clerk.*

In supreme court.

At a special term thereof held at the court-house in Bath, Steuben County, on the 15th day of April, 1864, present, Hon. E. Darwin Smith, justice.

THE BLOSSBURGH AND CORNING RAILROAD Company, respondents,
against
THE TIOGA RAILROAD COMPANY, APPELLANTS.

Upon reading the remittitur from the court of appeals in the
287 above-entitled action, from which it appears that the said court of appeals have adjudged that the judgment appealed from in said action be affirmed, with costs:

On motion of D. Rumsey, of counsel for respondents, it is ordered that the judgment and determination of the court of appeals stand as the judgment and determination of this court, and the judgment be entered in this court accordingly.

(Copy.) O. J. AVERELL, *Clerk.*

Supreme court.

THE BLOSSBURG & CORNING RAILROAD COMPANY, respondents,
against
THE TIOGA RAILROAD COMPANY, APPELLANTS.

Judgment April 26th, 1864.

An appeal to the court of appeals having been taken in the above-entitled action by the above-named appellants from a judgment entered in said action in the clerk's office of Steuben County on the first day of February, 1859, in favor of said respondent and against said appellant for $74.10, and affirming a former judgment entered in the said clerk's office on the 16th day of September, 1857, for $6,106.23, in favor of said respondent and against said appellant, and the appeal from said judgment having been heard in said court of appeals, and the said court of appeals having ordered that the judgment so appealed from be affirmed, as appears by the remit'itur from the said court on file with clerk of this court, and an order having been duly made and entered at a special term of this court held at Bath, Steuben County, on the 15th
288 day of April, 1864, that the said judgment and determination of the court of appeals stand as the judgment and determination of this court, and that judgment be entered in this court accordingly:

On motion of R. B. Van Valkenburgh, attorney for said respondent, it is adjudged that the said judgment of the court of appeals be and remain the judgment of this court, and that the said judgment of this court so appealed from to the court of appeals be and the same is hereby in all things affirmed. And it is further adjudged that the said respondent recover of the said appellant the sum of two hundred and seventy-eight dollars and two cents costs of the said appeal.

O. J. AVERELL, *Clerk.*

(Endorsed:) Supreme court. The Blossburgh & Corning Railroad Company, respondents, against The Tioga Railroad Company, appellants. Judgment-roll on affirmance, by court of appeals, R. B. Van Valkenburgh, attorney for respondents. Costs $278.02. Filed April 26th, 1864, 2 p. m.

STATE OF NEW YORK,
Steuben County, Clerk's Office, ss:

I, Allen A. Van Orsdale, clerk of said county, and clerk of the supreme court of said State, held in and for said county, do hereby certify that the foregoing is a true copy of a judgment-roll remaining on file in said office; that I have compared said copy with said original
289 judgment-roll remaining on file in this office, and that the same is a correct transcript therefrom and of the whole of such original.

In witness whereof, I have hereunto set my hand and affixed my official seal at Bath in said county, this 5th day of March, 1868.

[L. S.] A. A. VAN ORSDALE, *Clerk.*

[5-cent U. S. int. rev. stamp canceled.]

STATE OF NEW YORK,
Monroe County, ss:

I, E. Darwin Smith, do hereby certify that I am the presiding justice of the supreme court of the seventh judicial district of the State of New York, in which district is the county of Steuben; and I further certify that the foregoing attestation is in due form.

Witness my hand this 6th day of March, 1868.

E. DARWIN SMITH,
Presiding Justice.

291 And because the said court, before the judges thereof, now here, are not yet advised what judgment to give of and upon the premises, therefore, the process thereof is continued between the parties aforesaid of the pleas aforesaid, in this same court, before the judges aforesaid, until the third Tuesday of June, one thousand eight hundred and seventy-two, at the court-house in Canandaigua, in the county of Ontario, and the same day is given to the parties aforesaid, at the same place, to hear the judgment of the court thereupon.

At which said last-mentioned day, before the judges aforesaid, at the place last aforesaid, came the parties aforesaid, by their respective attorneys aforesaid; and thereupon all and singular the premises being seen, and by the said court here fully understood, and mature
292 deliberation being thereupon had, the said court, before the judges thereof, duly made and entered the order, of which the following is a copy:

At a term of the circuit court of the United States for the northern district of New York, held at the court-house at Canandaigua, in the county of Ontario, in said State, on the 18th day of June, 1872:

Present, Hon. Lewis Woodruff, circuit judge.
" " Nathan K. Hall, district judge.

THE BLOSSBURG AND CORNING RAILROAD COMPANY, *ag'st* THE TIOGA RAILROAD COMPANY.

A motion having been made at a former term of this court to set aside the report of Sanford E. Church, the referee in this action, made
293 in pursuance of an order of reference heretofore entered in said action, after hearing Mr. John H. Reynolds, of counsel for defendant, and Mr. D. Rumsey, of counsel for the plaintiff, it is ordered that the said motion be, and the same is, denied. And it is further ordered that the said report of the said referee so made and filed in this action be, and the same is, in all things confirmed, and that the said plaintiff have judgment thereon with costs.

Therefore it is considered and adjudged that the said report, &c., in all things stand confirmed; and it is further considered and adjudged that the said plaintiff do recover against the said defendant its damages, by the referee, in form aforesaid reported, to ninety-four thousand nine hundred and fifty-seven dollars and twenty-seven cents, and also ten thousand one hundred and seventy dollars and seventy-seven cents, for
294 his said costs and charges, by the court now here adjudged to said plaintiff, and with its assent, which said damages and costs and charges in the whole amount to one hundred and five thousand one hundred and twenty-eight dollars and four cents, and that he have execution therefor. And the said defendant in mercy, &c.

Judgment signed this third day of August, 1872.

CHARLES MASON, *Clerk.*

295

296 (Endorsed:) In circuit court of U. S. for northern district of New York. The Blossburg and Corning Railroad Company vs. The Tioga Railroad Company. Judgment-record. D. Rumsey, pl'ff's att'y. Damages, $94,957.27; costs, 10,170.77—$105,128.04. Filed August 3, 1872, 3 o'clock p. m.

297 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the northern district of New York, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court before you, between The Blossburgh and Corning Railroad Company, and The Tioga Railroad Company, a manifest error hath happened to the said The Tioga Railroad Company, as by its complaint appears: We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the first Monday of December next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right, and according to the laws and customs of the United States, should be done.

298 Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court the 12th day of August, in the year of our Lord one thousand eight hundred and seventy-two.

[SEAL.] CHARLES MASON,
Clerk of the Circuit Court of the United States for the Northern District of New York.

JOHN H. REYNOLDS,
Attorney for the Plaintiff in Error.

299

300 (Indorsed:) In the Supreme Court of the United States. The Tioga Railroad Company, pl'ff in error, vs. The Blossburgh & Corning Railroad Company, def't in error. Writ of error. John H. Reynolds, att'y for pl'ff in error.

I allow the within writ of error, August 20, 1872.
L. B. WOODRUFF, *Circuit J.*

Filed August 23, 1872.

301 UNITED STATES OF AMERICA, *ss:*

To the Blossburgh and Corning Railroad Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of New York, wherein The Tioga Railroad Company is plaintiff, and you are defendant in error, to shew cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this 20th day of August, in the year of our Lord one thousand eight hundred and seventy-two.

L. B. WOODRUFF,
Circuit Judge.

303 (Indorsed:) Supreme Court of the United States. The Tioga Railroad Company, pl'ff in error, vs. The Blossburgh and Corning Railroad Company, def't in error. Citation. John M. Reynolds, att'y for pl'ff in error.

Service of this citation is duly admitted by the defendant in error. Aug't 28, 1872.

D. RUMSEY,
Att'y for Def't in Error.

Filed September 2, 1872.

303 In the Supreme Court of the United States.

THE BLOSSBURGH AND CORNING RAILROAD Company,
vs.
THE TIOGA RAILROAD COMPANY.

Know all men by these presents, that we, The Tioga Railroad Company, and Ferral C. Dininny, Henry Sherwood, and Franklin N. Drake, of the town of Corning, county of Steuben, in the State of New York, are held and firmly bound unto the Blossburgh and Corning Railroad Company, in the sum of one hundred and twenty-five thousand dollars, to be paid to the said The Blos'burgh and Corning Railroad Company, its successors and assigns. To which payment well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our successors and heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated this 12th day of August, 1872.

304 Whereas the above-named, The Tioga Railroad Company, hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the northern district of New York, on the 3d day of August, 1872, in favor of the above-named plaintiff, and against the above-named defendant, for $105,128.04:

Now, therefore, the condition of this obligation is such, that if the above-named The Tioga Railroad Company shall prosecute its writ of error to effect, and answer all costs and damages if the said The Tioga Railroad Company shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

[TIOGA RAILROAD CO. L. S.] THE TIOGA RAILROAD CO.,
By FRANKLIN N. DRAKE. [L. S.]
FERRAL C. DININNY. [L. S.]
H. SHERWOOD. [L. S.]
F. N. DRAKE. [L. S.]

Sealed and delivered in presence of—
A. C. STEARNS.

305 STATE OF NEW YORK,
Steuben County, ss:

On this 13th day of August, 1872, before me, the subscriber, appeared Ferral C. Dininny, Henry Sherwood, and Franklin N. Drake, to me known to be the persons who executed the foregoing instrument, and who are described therein, and severally acknowledged that they executed the same for the purposes therein mentioned.

[L. S.] O. W. WELLINGTON,
Notary Public.

NORTHERN DISTRICT OF NEW YORK,
County of Steuben, ss:

Ferral C. Dininny, Henry Sherwood, and Franklin N. Drake, being each duly sworn, say, and each for himself says, that he is a householder and freeholder of the State of New York, and is worth the sum of one hundred thousand dollars over and above all debts contracted or liabilities incurred.

FERRAL C. DININNY.
H. SHERWOOD.
F. N. DRAKE.

Sworn before me this 13th day of August, 1872.
[L. S.] O. W. WELLINGTON,
Notary Public.

306 (Indorsed:) In the circuit court of the United States for the northern district of New York. The Blossburgh and Corning R. R. Co., vs. The Tioga Railroad Company. Bond in error.

I approve of the within bond, and the sureties therein, as sufficient to stay execution on the judgment within mentioned.
August 20, 1872.

L. B. WOODRUFF,
Circ't J.

(Orig.) filed August 23, 1872.

307 UNITED STATES OF AMERICA,
Northern District of New York, ss:

I, Charles Mason, clerk of the circuit court of the United States of America, for the northern district of New York, do hereby certify that I have compared the writings annexed to this certificate, and they are true copies of their respective originals, and are correct transcripts therefrom, now on file and remaining of record in my office, being a full and complete copy of the record and proceedings in the suit of The Blossburg and Corning Railroad Company vs. The Tioga Railroad Company.

In testimony whereof I have hereunto set my hand, and duly affixed the seal of the said court, at the city of Utica, in said district, this 1st day of November, in the year of our Lord one thousand eight hundred and seventy-two, and of the Independence of the said United States the ninety-seventh.

[SEAL.] CHARLES MASON, *Clerk.*

(Indorsed:) Supreme Court of the United States. The Tioga Railroad Company, plaintiff in error, vs. The Blossburg and Corning Railroad Company, defendant in error. Transcript of record.

(Indorsement on cover:) No. 250. The Tioga Railroad Company, plaintiff in error, vs. The Blossburg and Corning Railroad Company. N. New York C. C. U. S. Filed 14th November, 1872.

SUPREME COURT OF THE UNITED STATES.

THE TIOGA RAILROAD COMPANY, PLAINTIFF in error,
against
THE BLOSSBURG AND CORNING RAILROAD Company, Defendant in Error.

No. 250.

Abstract and Brief for the Plaintiff in Error.

This case comes into this court on a writ of error to the Circuit Court of the United States for the Northern District of New York (page 161).

The action was originally commenced in the Supreme Court of the state of New York, by the present defendant in error, against the plaintiff in error by the service of a summons upon one of its officers or agents at Corning, in the county of Steuben, on the 6th of May, 1864 (fols. 2, 207½), where the Tioga Company has had an office for the transaction of its business for more than twenty years.

Under the acts of congress the case was duly removed into the Circuit Court of the United States for trial. It was tried before a referee, who reported in favor of the Blossburg Company. A bill of exceptions was duly tendered by the Tioga Company, and upon it a motion was made in the Circuit Court to set aside the report and for a new trial which having been denied, judgment followed, and it is to review that judgment in this court upon the exceptions taken, that the writ of error was prayed for and allowed.

The action was brought by the Blossburg Company to recover of the Tioga Company a large sum of money alleged to be due, for receipts under a contract between the Tioga Company, and a railroad corporation known as the Corning and Blossburg Railroad Company, bearing date the 29th of July, 1851, the Blossburg Company claiming to have succeeded to all the rights of the Corning and Blossburg Railroad Company thereunder.

The declaration set out in various forms and in various counts the contracts under which the claim was made, and its breach, but the questions to be debated do not require that any special statement of its various allegations should be here made (*vide* declaration, pages 1 to 26).

The Tioga Company pleaded 1st, the general issue. 2d, payment. 3d, the six years' statute of limitations. The fourth and fifth pleas were substantially accorded and satisfaction but no question arises in this court upon any plea except that of the statute of limitations (fols. 53, 54, 55, 56).

The Blossburg Company by replication first took an issue of fact upon the plea of the statute of limitations (fol. 58½) and then by special leave of the court in a separate replication set out the fact that the Tioga Company was a corporation organized under the laws of the state of Pennsylvania and not created or existing under the laws of the state of New York, and that when the supposed cause of action, accrued in favor of the Blossburg Company the Tioga Company was out of the state of New York and so remained until this action was commenced (fols. 58½, 59).

The rejoinders of the Tioga Company, averred that when the supposed cause of action accrued it was not and had not since been out of the state of New York (fol. 61), and upon this and the other issues the cause went to trial with the result before stated.

It will be convenient to here state the leading features of the case and they are the following:

In 1851, the Tioga Company, a corporation created by the laws of Pennsylvania, was the owner of a rail road extending from the line of the state of New York, near Lawrenceville, to Blossburg in the state of Pennsylvania, a distance of about 26 miles.

The Corning and Blossburg Railroad Company was the owner of a rail road about 15 miles in length, extending from the state line, near Lawrenceville, to Corning, New York.

The roads of the two companies connected at the state line.

In 1851, it was contemplated by each company to rebuild its road, and in view of the accomplishment of such purpose, and to provide for the operating of both roads when completed as one continuous railway from Corning to Blossburg, the companies entered into the agreement, upon which the action is brought.

One question in controversy arises upon the construction of a clause in the agreement of July 29th, 1851, before referred to.

By that agreement it was provided, that when the railway should be completed and ready for use, the Tioga Rail Road Company should operate the same from Corning to Blossburg for the term of ten years. The stipulation in the agreement is in the following words: "The said Tioga Rail Road Company further agree that when the said rail road shall be relaid and ready for use as aforesaid, they will operate the same from Corning to Blossburg, for the purpose of transporting passen-

gers, mails, coal, lumber, merchandise and such other freights as shall be furnished for transportation upon the said rail road; and for that purpose, shall furnish and provide, maintain and keep in repair the necessary motive power, engines, machinery and cars (nevertheless, they shall not be bound to furnish coal cars), for all the regular business that shall be furnished to said rail roads. Uniform rates of toll and charges for transportation of passengers, mails and freights on and upon the said rail roads shall be established annually, by the mutual agreement of the said companies; and in case of disagreement between them such rates of toll and charges shall be settled by disinterested persons, each party choosing one; and in case such persons can not agree, they to be at liberty to choose a third; and for the use of the said rail road of the said Corning and Blossburg Railroad Company, and the use of their depots, engine houses, machine shops, grounds, water stations, &c., the Tioga Rail Road Company agrees to pay to the Corning and Blossburg Rail Road Company two-thirds of the receipts for passengers, mails and freights which shall be taken, for the said Corning and Blossburg Rail Road; the expenses charged customers for the loading and unloading coal, lumber, and other freights, and for warehousing, *and such additional charges, by way of discrimination, as shall be made for short distances for motive power, not to be included in the term receipts as above mentioned.*" (Page 3, fols. 6½, 254½.)

Uniform rates of tolls and charges for transportation of passengers, mails and freights was established under the agreement for one year, commencing March 1, 1854, and was never changed.

The Blossburg Company claimed two-thirds of all the "receipts" for transportation over the Corning and Blossburg Rail Road by the Tioga Company under this "tariff of rates" during the whole period of ten years.

The difference resulting from a discrimination in the tariff of rates for short distances, the defendant claimed to retain, as being the sum of "additional charges by way of discrimination * * * for short distances for motive power," not included in the term "receipts" as provided in the agreement.

It will be seen by an examination of the "tariff of rates" that "discrimination" is made in it (the tariff) for short distances. (Page 33.)

"This "discrimination" and its amount in each instance is shown by the tariff itself, wherein the distances from station to station from Corning to Blossburg, are stated, and the rate of charges for freight, upon 1000 ft. B. M. of lumber is exhibited. The rate of charges upon other descriptions of freight is also set forth in this tariff.

Taking the charges upon 1000 ft. B. M. of lumber as best showing the actual "discriminations" the result is as follows:

The charge from Blossburg to Corning (the whole length of the road), 41 miles, is $1.50, or 3.65 cts. per mile.

The charge from Covington, 36 miles from Corning, is $1.40=3.88 cts. per mile, the discrimination is 0.23 cts. per mile.

The other distances are thus tabulated:

From	To	Distance.	Per mile	Discrimination.
Mansfield	Corning,	31 miles,	$1.30=4.16 cts.	0.54 cts. per mile.
Kelly's Mill	do	30 "	$1.25=4.16 "	0.51 "
Mill Creek	do	25 "	$1.20=4.81 "	1.15 "
Bevy's Bridge	do	23 "	$1.10=4.78 "	1.13 "
Tioga O. Station	do	21 "	$1.05=5 "	1.35 "
Mitchell's	do	20 "	$1.05=5 "	1.35 "
Somers' Lane	do	17½ "	$0.95=5.42 "	1.77 "
Laurenceville	do	15 "	$0 85=5.66 "	2.01 "
Lindley	do	12½ "	$0.75=6 "	2.35 "
Cook's Turnout	do	11½ "	$0.65=5.65 "	2 "
Erwin Centre	do	8½ "	$0.60=7 "	3.35 "

It will be observed that the amount of discrimination is proportioned to the shortness of the distance of transportation. For example, from Mill Creek to Corning, 25 miles, the tariff rate is $1.20 per 1000 ft., equal to 4.8 of a cent per mile, being a "discrimination" as against the rate from Blossburg to Corning of 1.15 of a cent per mile. From Erwin Centre to Corning, 8½ miles, the tariff rate is 60 cents per 1000 ft., equal to 7 cents per mile, and the "discrimination" as against the rate from Blossburg is 3.35 of a cent per mile.

It has been before said that one of the defenses interposed was the six years' statute of limitations. It appeared that at all times during the existence of the contract of 1851, up to the commencement of this suit, the defendant had property in the state of New York, had an office at Corning with directors, officers and agents constantly there and was at all times suitable in the courts of that state, and were in fact sued by the plaintiff in 1855, in its courts for a part of the demand claimed in this action, and in fact were sued in this action, by service of process upon some of the defendant's officers or agents at Corning (pages 71, 72, 76, 123), and yet it was decided by the referee that the defendant was not in the state, and could not get into it, and even if amenable to the process of the state courts, the statute of limitations was no defense, and gave judgment against the Tioga Company for the amount claimed.

The errors assigned by counsel for the plaintiff in error for a reversal of the judgment below are the following:

First. That the court below erred in its construction of the contract and that upon a true construction the Blossburg and Corning Company was not entitled to recover anything, unless

for the damages consequent upon surrendering the road in a defective condition at the termination of the contract.

Second. That the action was barred by the statute of limitations in respect to the largest portion of the amount recovered in the court below.

Third. That improper evidence was received on the trial on behalf of the Blossburg Company under the exception of the counsel for the Tioga Company.

Fourth. That proper evidence offered by the counsel for the Tioga Company was erroneously rejected on the trial of the cause.

Each of these questions arise upon exceptions specifically taken on the trial, and are presented by a bill of exceptions duly engrossed upon the record.

BRIEF AND POINTS FOR PLAINTIFF IN ERROR.

FIRST. The clause of the contract, under which a recovery was sought, did not entitle the plaintiff below to recover.

(1.) The agreement was to the following effect. The Tioga Company was to use and operate the Blossburg Company's road, to wit: its track, depots, engine houses and other appurtenances, and to pay for the use of them two-thirds of the receipts taken for transportation over the last named road (fols. 6, 7).

Transportation was to be wholly performed by the Tioga Company; that is to say, the power, machinery and facilities by which the road was to be operated were to be furnished wholly by it.

The use (wear and tear) of its track and fixtures, solely, entitled the Blossburg Company to compensation, and it was for that, *and nothing else*, that the Tioga Company agreed to pay.

(2). The Blossburg Company's compensation being contingent upon the amount of transportation earned, it was reasonable that it should be consulted in respect to the tariff of charges. And it was therefore stipulated "that uniform rates of toll, and charges for transportation of passengers, mails and freights on and upon the said rail roads shall be established annually by the mutual agreement" of the parties (fol. 6).

(3). The agreement evidently contemplated that, in the charges for transportation of freight upon the road, "discriminations" would be made for "short distances

for motive power." Such "discriminations" are thus made upon all rail roads and upon all transportation lines. They are made on account of the enhanced proportionate expense of "motive power;" by which phrase is meant the apparatus by which freight is moved from point to point over and upon the road. It is necessarily a matter of common knowledge that it costs more (and is worth more), per mile, to move a ton of freight 10 miles upon a rail road, than it does, per mile, to move the same ton 50 miles upon the same road.

(4). If demonstration were needed of so obvious a proposition, it need only be suggested that in starting a train from Blossburg, one of the *termini* of the road, to make its regular run to Corning, the company comes under the same expense, whether the freight to be transported be 10 tons or 1,000 tons, since in either case there must be a locomotive, and the same number of men to operate it, and manage the train; and if it be anticipated that there will be freight awaiting transportation at intermediate points, empty cars must be provided and drawn to the points at which they may be required; and then, at the way stations there must be delays, switchings, risks, and labor and care in respect of the additions being made to the train.

Therefore it is that the freighter for shorter distance is charged proportionately more than the through freighter, and a "discrimination" is made against him.

(5). But it is equally obvious that these considerations affect the *operating of the road* only. They are of no account as respects the track and its appurtenances. The moving of freight a distance of 10 miles certainly does not wear the superstructure to a greater proportionate extent, than the moving of the same freight over the entire length of the road; and a discrimination for short distances, for the benefit of the party whose road is being used, and who does not furnish motive power, involves an absurdity.

(6). The foregoing statement of the circumstances and surroundings, in the light of which it is claimed the court should interpret the clause of the contract in question, illustrates the error into which the court below has fallen.

(*a*). The parties gave to the clause a *practical* construction, by agreeing upon a tariff of rates which includes and shows the "discriminations."

(*b*). They could not have contemplated that further or "*additional*" "discriminations" were to be made or charged without agreement and at the option or caprice of the defendants, else why stipulate in advance that the rates of charges for transportation should be fixed annually by agreement.

(*c*). This tariff of rates was for the information of the public. It was intended to be, and was in fact and by law, the maximum of charge for transportation, to which freighters were to be subjected.

Session Laws of 1850, p. 211, §§ 28, 33, 36.

Charges for warehousing, loading and unloading coal, etc., are the earnings of the warehouseman, and the stevedore, and not the *carrier*.

(*d*). Full, and the only appropriate effect is given to the word "*additional*," by the construction contended for.

The freighter from Blossburg to Corning is charged 3.65 cts., per mile on his 1000 feet of lumber. The freighter from Erwin Centre to Corning is charged 3.65 cts. per mile and 3.35 cts. per mile "additional" by way of "discrimination" for motive power.

If the view of the Blossburg Co. be the correct one, the freighter from the latter place may, notwithstanding the published tariff, be subjected to another and further "additional" charge.

And this "*other*" and "*additional*" charge may, at the option of the defendant, be fixed at so high a figure as to discourage shipments from that station, and thereby seriously affect the Blossburg Co.'s income, and defeat the only conceivable purpose of the stipulation in the agreement for uniform and agreed rates of charges.

(7). The interests of the contracting parties and the terms of the agreement alike establish that the uniform rates of charge to be agreed upon were to include and fix the amount of the additional charge by way of discri-

mination for motive power. That such charges should be made at all, was required only by the interest of the Tioga Company, which alone furnished the motive power and alone sustained the expenses and inconveniences that were to be compensated by the additional charges. That they should be limited in their amount, the interest of the Blossburg Co. required, in order that its excess should not deprive its road of its fair share of business. On this construction the agreement provides for and justly protects the interests of both the parties, and distributes their common gains according to their respective contributions to the common enterprise. On the other construction it gives to the parties who did not furnish the motive power the compensation which is earned by, and proportioned to the amount of the motive power employed, and leaves the other party, who does furnish the motive power either uncompensated, as is the fact under the ruling of the court below, or at liberty to impose without restriction such additional burdens beyond the agreed rates on the traffic over the Blossburg Co.'s road, as its interests may dictate.

(8). The construction put upon this contract by the courts of the state of New York, however much entitled to respect, is not of binding force upon this court. It is not a case within the meaning of the rule requiring the courts of the United States to administer the common law of the state, in which it assumes to dispense justice. This court may give a construction to the contract, according to its own sense of right and justice, without any regard to what the state courts have done.

Swift v. Tyson, 16 Peters, 1.
Chicago v. Robbins, 2 Black, 418–281.

(9). It is declared by the 34th section of the judiciary act (1 Stat. at Large, 92), "that the laws of the several states, except where the constitution, treaties or statutes of the United States, shall otherwise require or provide, shall be regarded as the rules of decisons on trials at common law in courts of the United States, in cases where they apply."

(*a*). In Swift v. Tyson, above cited, it was distinctly held that the provisions of the act of congress above quoted applied to state laws *strictly* local and does

not apply to the *construction* of *contracts* or to questions of general commercial law. After discussing the question as to the true construction of the statute, Mr. Justice Story, speaking for this court, said: "And we have not now the slightest difficulty in holding that this section, upon its true intendment and construction, is strictly limited to local statutes and local usages of the character before stated *and does not extend to contracts and other instruments of a commercial nature, the true* interpretation, and effect whereof, are to be sought not in the decision of the local tribunals, but in the general principles and doctrines of commercial jurisprudence" (16 Peters, 1, 18, 19).

(*b*). The same rule is applied to the construction of wills in opposition to the judgments given by state courts, and it will be shown that the judgment of state courts upon the construction of local statutes have not, in all cases, been regarded as conclusive.

SECOND. The statute of limitations of the state of New York, was a perfect defense against every part of the plaintiff's demand accruing at any time six years before the commencement of this suit on the 6th of May, 1864, that is, as to all of the claim of the plaintiff which became due on or prior to the 1st day of May, 1858.

(1). It was proved and conceded that during all the time of the existence of the contract of 1851, the defendant had property within the state of New York, an office at Corning, N. Y., directors, officers and agents, constantly within this state and at all times amenable to the process of its courts, and in fact, in 1855, the plaintiff availed itself of this condition of things by bringing a suit against the defendant for a portion of the demand claimed under the contract now in controversy; recovered judgment and collected the same, and that in fact this suit was commenced by personal service of a summons upon the defendant's agent at Corning. It is therefore apparent that the Tioga Company has been, at all times, subject to a suit at law for any debt it owed to the Blossburg Company or any other party and yet it is said that the statute of limitations is no defense (fols. 131, 132, 133, 142, 143).

(2). The question arises under sections 73, 74, 89, 91 and 100 of the Code of Procedure of New York, enacted in 1848, in substance as follows:

Sec. 73. The provisions contained in the chapter of the *Revised Statutes* of New York of 1830, entitled "Of actions, and the times of commencing them," are repealed, and the provisions of this title are substituted in their stead.

Sec. 74. Civil actions can only be commenced within the periods prescribed in this title, after the cause of action shall have accrued, except where, in special cases, a different limitation is prescribed by statute.

* * * * * * * * * *

Sec. 89. The periods prescribed in section 74 for the commencement of actions, other than for the recovery of real property, shall be as follows:

Sec. 91. Within six years: 1. An action upon a contract, obligation or liability, express or implied, excepting (judgments and sealed instruments).

Sec. 100. If, when the cause of action shall accrue against any person, he shall be out of the state, such action may be commenced within the terms herein respectively limited after the return of such person into this state; and if, after such cause of action shall have accrued, such persons shall depart from and reside out of this state, the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action.

(3). In respect to corporations, existing under the laws of New York, no question would be made but that a large, and much the largest, amount of the recovery below, would have been absolutely barred by the statute of limitations. But it is urged that the Tioga Company, being a foreign corporation, that is, one existing under the laws of the state of Pennsylvania, is not in this respect within the protection of the New York statute of limitations.

(*a*). In 1848 (Code of Procedure, §§ 113), in respect to the commencement of suits by the personal service of a summons, by the delivery of a copy, it was enacted by the legislature of New York, as follows: "1: If the suit be against a corporation to the president (that is delivery of the copy), or other head of the corporation, secretary, cashier, or managing agent thereof."

(*b*). It is to be observed that this provision in terms apparently applied to all corporations, both domestic and foreign.

(*c*). In 1851 (Code of N. Y., § 134), the subdivision above quoted was amended as follows: "1. If the suit be against a corporation (delivery of copy summons) to the president, or other head of the corporation, secretary, cashier, treasurer, a director or managing agent thereof, *but such services can be made in respect to a foreign corporation only where it has property within this state or the cause of action arose therein.*"

(*d.*) This enactment enabled the Blossburg Company to sue the Tioga Company in the courts of New York, for any demand then accrued, or thereafter to accrue, and in fact the record shows that in 1853, the Blossburg Company did avail itself of this law and recover in the courts of New York, against the Tioga Company, for a portion of the demand claimed and recovered in this action, and the record of that judgment is prevented on the trial and received as proof of an estoppel, against the Tioga Company upon the construction of the contract, and yet it is said that the Tioga Company has never been, in the eye of the law within and cannot by agents or otherwise get within the territorial limits of the state of New York, so as to be subject to the operations of its laws of exemption, although amenable to prosecutions in as liberal a sense as any other citizen or corporation.

(*e*). In 1859, the subdivision of the section of the code before referred to was amended by adding at the end the words: "*or where such services shall be made within this state personally upon the president, treasurer, or secretary thereof.*"

(*f*). It is thus entirely apparent that ever since 1848, it has been in the power of any creditor of the Tioga company to sue it in the courts of New York, and recover a judgment against it as effectual and conclusive as any that could be obtained against any citizen or domestic corporation, for it has had, during all that time, property within the state, and officers upon whom process could have

been personally served and in this case the cause of action, if any, arose within the state of New York.

(4). The exceptions contained in section 100, do not cover the case of a foreign corporation, its terms relating to natural persons alone.

Faulkner vs. Delaware R. R. Co., 1 Denio, 441.

(*a*). The decision in Olcott vs. Tioga R. R. Co., 20 N. Y., 210, is not of controlling authority in the courts of the United States. It is only a series of decisions which attain that force.

McCutchen vs. Marshall, 8 Peters, 220.
Harpending vs. Dutch Church, 16 Peters, 455.
Green vs. Malidefee, 6 Peters, 291.

(*b*). The construction given to a state statute by a state court in a single decision ought especially to be open to revision when it is adverse to persons or corporations of other states and has its only effect on them.

Gelpeke vs. Dubuque 1 Wallace, 175.

(*c*). A statute of limitation, can scarcely be regarded as a purely *local* statute in the same sense in which the courts of the United States are bound to follow the interpretation given by the courts of any state. It largely pertains to the commercial law of the world. While these statutes are enacted by local legislatures, they affect, in a greater or less degree, all commercial transactions and more especially of our own country. If the citizens or corporations of one state, doing business in another, may be pursued for debt under its laws as an ordinary citizen, it should be accorded the same exemptions that are due to all other citizens impleaded in the same court. If this be not done there is an infraction of public law.

Angell on Limitations, §§ 21, 22, 23, 24.

(5). On the principles of interpretation adopted in Olcott vs. the Tioga R. R. Co., the terms of the exception are equivalent to a provision that a party must be actually subject to suit for six years. It follows that if the corporation in question was so situated that it was liable in fact by law to be sued in New York, during the six

years next after the causes of action accrued, then it was not out of the state, in the sense of the law during that period.

(1). The law of the state of New York had provided full means of suing the Tioga Co. at any time after causes of action accrued.

Code, Sections 127, 134, 135.

(2). It was incumbent on the Blossburg Co. to show that the defendants were not suable.

(6). When a party is capable of being sued, the statute of limitations in ordinary cases begins to run against any demand of a plaintiff. In the present case the Tioga Co. was at all times subject to the process of the courts of this state, if not of the United States.

Code, § 134, also vide Code of 1849, 1851, 1859.

(*a*). The Tioga Co., although a corporation, comes under the designation of a person or persons within the meaning of the statute.

2 Rev. Stat., 778, § 11.
Olcott vs. The Tioga R. R. Co., 20 N. Y., 210, 222, 225, 226.

(*b*). Within the intent and meaning of the statute the Tioga Co. for six years prior to the commencement of this action has been within the state of New York, and amenable to the process of its courts.

Code, §§ 99, 134.
Silver Lake Bank v. North, 4 Johns. Ch. R., 370.
Carey v. C. & T. R. R. Co., 29 Barb., 35.
Merrick v Van Santvoord, 34 N. Y., 213.
Olcott v. Tioga R. R. Co., 2 N. Y., 215.
Hill *Arguendo.*
Davis v. Garr, 6 N. Y. Rep., 135.
Power v. Hathaway, 43 Barb., 217, 219.

(*c*). The courts have uniformly applied to statutes of limitation a liberal construction, and in many instances have accommodated the strict language of the act so as to effectuate the *general* intention of the legislature.

Per Denio, J., in Olcott v. The Tioga R. R. Co., 20 N. Y., 223.

(*d*). The *general object* of the statute of limitations, is to save the remedy of the creditors in all cases where

he was prevented from prosecuting the debtor in our courts in consequence of the absence of the latter from the state (*ibid*, 221, 222).

(*e*). The only reason that can be assigned for permitting the absence of a defendant when the cause of action accrued to prevent the statute from beginning to run *is the inability of the plaintiff to prosecute his claims* during such absence.

Per Duer, J., in Ford v. Babcock, 2 Sandf., S. C. R., 529.

(*f*). And it follows that the only question is whether the Tioga Co. has been *within* the state and *amenable* to the process of its courts for six years next before the commencement of the suit.

Power v. Hathaway, 43 Barb. S. C. R., 214, 219.
McCord v. Woodhull, 27 How. Pr. Rep., 55–6 & cases there cited.
Davis v. Garr, 6 N. Y. R., 124, 125.

(*g*). A party may never have been within the state, and it may be impossible that he should ever be, as in the case of a foreigner dying abroad after a right of action has accrued. By a strict interpretation of the statute the action never could be barred, but it is held that from the time of granting letters of administration within the state, the statute begins to run.

Townsend v. Deacon, 3 Exch., 706.
Strithurst v. Graeme, 3 Wils., 145.
Benjamin v. Degroot, 1 Denio, 151.
Davis v. Garr, 6 N. Y. R., 124.

(*h*). And the reason why the statute in such case can begin to run is that before the granting of letters the decedent had never been within the state or his estate or property became amenable to our laws, but thereafter the plaintiff would be able to prosecute his claim in our courts. *Vide cases supra.*

Power v. Hathaway, 43 Barb., 214.
McCord v. Woodhull, 27 How. Pr. R., 556.
Olcott v. Tioga R. R. Co., 20 N. Y., 201.

(*i*). And such is the present case. There has been no inability of the Blossburg Co. to prosecute its claims at any time within six years prior to the commencement of this suit. This remedy has

been at all times saved as the Tioga Co. had property,— an office — directors, officers, and managing agents, residing and being at all times within the state, upon whom process could be served and by which it would be bound.

Code, 1851, Laws of 1851, vol. 2, p. 48, § 134, sub. 1.
Code, § 134.
Laws of 1855, pp. 470, 471, § 1, 2, 3.
Merrick vs. Van Santvoord, 34 N. Y. Rep., 20Ɛ, 212, 213.

(*j*). The Tioga Co. has at all times "*kept an office for the transaction of business*" within the state, and as soon as the Blossburg Co.'s right to sue occurred, the obligation of diligence attached, and the statute of limitations began to operate.

Olcott vs. the Tioga R. R. Co., 20 N. Y. R., 226.

THIRD. The result of the case of Olcott vs. the Tioga Rail Road Company, 20 N. Y. R., 210 if to be followed is not controlling in the case at bar, or upon the questions now involved. The distinction between the cases is obvious.

1. In the Olcott case it was substantially held that the statute of limitations was no defense for that the defendant was never within the state and never in condition to be sued in the courts of New York, and it was in effect conceded by the counsel for the plaintiff in that case (Mr. Hill), and by the court also, that if the defendant had been at any time subject to the process of the courts of New York, at such moment the statute of limitations began to operate upon the demand.

2. And it was claimed in the very first point of the plaintiff's counsel, that the suit, in that case, was brought *as soon as process could be served* (see Mr. Hill's point I, 20 N. Y. R., 210). In the case at bar the Tioga Company was amenable to process at all times during the existence of the contract in controversy and the Blossburg Company has upon several occasions availed itself of this condition of things, by commencing suits against it in the courts of New York.

3. The case of Olcott v. The Tioga Rail Road Company did not show that at any time the defendant therein had been amenable to the process of the courts of

New York, until the summons in that suit was in fact served, and the case was determined upon the ground that the defendant, until that time, had not been amenable to the process of the courts of the state of New York.

This was the position of the plaintiff's distinguished counsel in that case, as may be seen in his fourth point (20 N. Y., p. 215 (1). Alluding to foreign corporations, he admits that such corporations, though they cannot change their residence, may voluntarily *come into this state* and their capacity to do so, for the purpose of contracting debts, *acquiring property, suing and being sued* has been almost universally recognized.

20 N. Y. R., 215, *supra.*

4. In this case it appears that the Tioga Company had all the time an office at Corning, and has been continually *within* the state for the purpose of being sued and therefore it is different from cases where persons come into the state in the morning having residences in a foreign jurisdiction, and go out at night to their homes for repose. Such persons are perhaps not *continuously within* the state *de die in diem*, within the meaning of the statute of limitations.

5. It has come to pass that corporate bodies created in one state, with no special disabilities, may transact business in all states of the Union, subject to the same rules as pertains to individual residents. They may sue and be sued, like every other person and this is matter of daily occurrence and the fact is recognized and acted upon in all courts and places, within the limits of the state of New York.

6. The laws of New York do not prohibit foreign corporations from doing business within its territorial limits. On the contrary, they are invited within the jurisdiction of its courts, and the statutes permitting the service of process upon them places them in a very large degree upon the same footing as corporations created by the laws of New York. Having the same rights and obligations as domestic corporations, of suing and being sued, the same measure of justice must be awarded to them under the statute of limitations. The application of such a rule is in harmony with the decisions of all the courts.

Merrick vs. Van Santvoord, 34 N. Y., 212, 213.

FOURTH. The statute of limitations has been aptly termed "a statute of repose." It is founded upon the frailty of human memory, and perhaps of human nature. It is intended to put a *quietus* upon stale demands, and fading recollection. It is a stimulus to vigilance, and none but those who "sleep upon their rights," suffer by it. It applies as well to the citizen as a foreigner, to a corporation as well as a natural person, and its protection is the more essential to a corporation having large business interests extended over a wide range of territory and conducted by a multitude of officers, servants and agents.

Ruggles vs. Keeler, 3 Johnson R., 263.
Kane vs. Bloodgood, 7 Johns. Ch. R., 90, 129.
People vs. Trinity Church, 22 N. Y. R., 44.
Olcott vs. Tioga Rail Road Company, 20 N. Y. R., 210, 222, 225, 226.

1. There is no reason for not giving the benefit of this statute to a foreign corporation. The ancient notion that they have no capacity to migrate is now practically exploded. They do migrate in fact, and are recognized as living things, in all places. Their rights are respected and their obligations enforced. There can be no wrong in saying that a plaintiff, who may sue for a debt claimed to be due from a corporation created in another state, will be defeated in his action, if he does not prosecute within the ordinary period of limitation.

2. The rule is elementary and universal that whenever a party has a right to sue and can sue his debtor, the statute of limitations begins to run against him, and he must be dilligent and bring his action within the prescribed period or it is gone forever.

3. The case of Olcott vs. the Tioga R. R. Co., 20 N. Y. R., 210, for another reason does not control this case as before stated.

   (*a*). It involves the idea of a "new departure" from the rule of law as settled thirty years ago in Faulkner against Delaware and R. C. Co., 1 Denio, 441. Such "oscillations" in a state tribunal are not approved or followed in the federal courts, more especially when they "make a sacrifice of truth, justice and law."

(*b*). But the Olcott case is unlike this. In that case it did not appear that the defendant could have been sued until the day the action was in fact commenced and the case was decided upon that ground. The case in fact admits that if the defendant had been suable the statute of limitations would have been a defense. In the present case the defendant was at all times suable, and the statute of limitation is a perfect defense against all claims arising more than six years before the commencement of this suit, and for this reason the judgment below must be set aside and a new trial ordered.

FIFTH. On the trial of the cause in the court below improper evidence was received on behalf of the Blossburg Company and for that reason the judgment should be reversed and a new trial ordered.

(1). It appears in the record (fol. 218) that on the 14th of February, 1855, the Blossburg Company commenced an action in the Supreme Court of New York, against the Tioga Company, by the service of a summons upon its then president Joseph W. Ryers at Bath, in the county of Steuben, for an amount of receipts for alleged "discriminations," under the contract of 1851 (relied upon in this case) from the 1st of June, 1854, to the 1st of January, 1855, and recovered judgment for the amount claimed which was sustained in all the New York courts (see record from pages 122 to 159 inclusive). This record of judgment was offered in evidence for the purpose of estopping the Tioga Company from debating the question as to the construction of the contract, and it obviously could not be pertinent, in any other aspect. The evidence was objected to, on the ground "that it was not admissible as an estoppel because it had not been pleaded; that it could not be admitted as evidence for the plaintiff because it had not been pleaded; that if it could be admitted it was not conclusive; that if it would operate as an estoppel in the state of New York it was not binding upon the circuit court of the United States, and that the cause of action was for a different sum of money mentioned in the record and the defenses interposed by the defendant (the Tioga Company) were entirely different and distinct." The record was received and read in evidence * * *

and to this the defendant (the Tioga Company) duly excepted" (fols. 105, 106).

(2). The referee, in deciding the case, held the record thus introduced an estoppel against the Tioga Company upon the question of the construction of the contract as is shown by the memorandum of the points decided by him, which is in fact a part of the record (fol. 211), and is found in appendix A. to this brief, and it is submitted that this was error for the reason, if for no other, that the decisions of the courts of New York were not binding upon the courts of the United States on the construction of the contract.

Swift v. Tyson, 16 Peters, 1, *et. seq.*
Phillips' Practice (2d. 3d.), pp. 191 to 202.

(3). This record of the judgment in the courts of New York apparently being, in the opinion of the counsel for the Blossburg Company, unable to stand alone, it was attempted to be vitalized by evidence and the following is disclosed by the record (fols. 192 to 196).

"D. Rumsey, counsel for plaintiffs, being duly sworn, testified as follows:

I attended as counsel for the plaintiff on the trial of the former action, of which the record has been given in evidence. The only question in controversy there.

[Objected to.]

The witness proposes to state what matters were in controversy in that suit.

[Objected to on the grounds that it can only be proved by proof of what the evidence was. Objection overruled, defendant's counsel excepted.]

The only question in controversy in that action was whether the discriminations for motive power for short distances were included in the tariff of rates. The defendants contended there that the plaintiffs were entitled only to a *pro-rata* estimate on the tariff of rates laid down, in the freights from Corning to Blossburg and from Blossburg to Corning, over the whole length of the road. The plaintiffs contended that they were entitled to all the earnings of the road from the points at which the freight and passengers come on the road and so far as they were transported over the Corning and Blossburg Rail Road, at that rate. The contract itself provided that they were to have one-third ($\frac{1}{3}$) for the expense of running, and the plaintiffs were to have two-thirds ($\frac{2}{3}$) of the balance in proportion to the dis-

tance run over their road. The question is distinctly stated in the testimony of Mr. Beers in the case in the Court of Appeals. That was the only question in the case.

Cross-examination by defendant's counsel. You say the only question was whether the discriminations referred to by the contract was referred to by the tariff of rates? It is the same question I have referred to. The question was what share were they to have?

You simply say, the only question litigated was whether in fact the discriminations on account of motive power for short distances was in fact embraced in the tariff of rates? That is principally the question.

Was that the question? That was the question.

Was it the only question? Yes, I think it was the only question.

Therefore a mere question of fact? There was no other question litigated, and the only evidence given on that question.

It was proved then on that occasion that these discriminations were not embraced in that tariff? The only proof on that question was the testimony of Mr. Beers.

I ask you whether it did not appear on the trial of that case, so far as that case was concerned, that there was no such discrimination in the tariff of rates? It was contended —

I don't ask that. It was proved upon that trial.

No, No, No! That was not the only proof.

I ask whether it was not established on the trial of that case that there was no discrimination made in the tariff of rates, was it or was it not? There was no question made about that.

The question is, did it appear on that trial whether there was or was not a discrimination? That did not appear except as it was apparent from the testimony.

You have stated that the only question was whether the discrimination referred to in the contract on account of motive power for short distances was or was not included in the tariff, is that so? That was the only question.

Was it not established on that trial that there was no such discrimination in the tariff? No, Sir, *there was no proof upon that question.*

Then the question in controversy was not tried? Yes, sir, it was; it was the legal construction of that contract.

Then the question was not whether the tariff of rates embraced this discrimination? Yes, sir, the defendant claimed —

I don't want that.

(By the referee). *The point, it seems to me, is, whether the tariff of rates showed this discrimination? It did not, that was so held and so claimed.* I propose to make this statement, that at the time the plaintiffs claimed, all the way through, that the increased price of carrying freight for short distances over long distances was the discrimination for motive power.

(By the referee). *The tariff of rates did not show the discrimination? No, sir, they claimed it did. The plaintiffs claimed it did not, that the discriminations alluded to in the contract were discriminations outside the tariff rates.*

Was there any proof given on that trial to show that outside the tariff of rates there was any discrimination made? Yes, sir, Mr. Stearns testified on that trial that they ran saw-logs over the road under special contract; and he testified also —

Is that in the record there? No, sir, he testified they made special contracts for running saw-logs outside the tariff rates.

That is not the question. The question is, was there any evidence given to show that there was any discrimination made outside the tariff of rates? Simply that they made bargains for transporting timber outside the tariff of rates. Then there was the evidence of Mr. Stearns, he testified that we —

Was there any evidence on that trial that showed any discrimination for short distances outside the tariff of rates? Yes, sir, there was.

What was that evidence? That was the testimony of Mr. Stearns, in regard to the saw-logs.

Did this testimony in regard to saw logs have any reference to short distances or long, or was it only special rate to carry that tonnage over the road? That is all, sir: That was given for the purpose of showing what arrangements were made outside the tariff of rates. And he further testified that they charged customers for unloading and loading at warehouses in addition to the rates stated in the tariff of rates. It was given in reference to that portion of the contract that speaks of additional charges by way of discrimination for motive power for short distances.

Do you claim that that arrangement for carrying saw logs was made by the Tioga Rail Road Company

itself or with the consent of both parties? I do not recollect.

Don't you know that Mr. Stearns testified on that subject, that in view of the fact that these logs could not afford to pay full rates, that special rates should be made for their transportation, and made it less rates instead of larger? I do not recollect what was said about the price.

Did Stearns pretend that that was a discrimination for short or long distances, or was it simply for that particular freight being carried over the road? That was all, sir, and it was offered simply for the purpose of showing that they did not confine themselves to the tariff of rates in regard to all property."

4. It thus appears, if it could be properly made clear by oral evidence of the counsel who has managed the controversy in all the courts for the Blossburg Company, that the recovery in the courts of New York was for alleged discrimination for motive power outside of the tariff of rates agreed upon by the parties, whereas in this case it was claimed that the discriminations, on account of motive power, were in fact in the tariff rates and by the true construction of the contract were a part of the receipts in which the Blossburg Company had a right to participate, and it thus happens that the record of a judgment in the courts of New York that proceeded upon one state of facts is made conclusive, where, in another action between the same parties, a judgment is obtained upon an entirely adverse condition of things.

(*a*). If there appears to be any obscurity on this question it is not chargeable to the Tioga Company. The demand in this case by the Blossburg Company was claimed and recovered as "receipts" under the contract of 1851 for discriminations made by agreement in the tariff of rates on account of motive power for short distances, upon a construction of the contract that referred discriminations of that character to special arrangements, with the Tioga Company for transportation of persons and property in disregard of the tariff rates to which both parties upon a full appreciation of their respective interests had assented. This judgment has been given by the court below because it was supposed to be

estopped in its construction of the contract by the decisions of the court of the state of New York, where at least it was claimed that the discrimination in controversy did not appear in the tariff of rates agreed upon under the contract.

(*b*). For the facts above stated we have the unassailable evidence of the counsel of the Blossburg Company before quoted (record, pages 109, 110, 111), on the one point and that of its accountant, Mr. Beers, on the other (record, fols. 199, 200).

SIXTH. The judgment below should be reversed because proper evidence offered on behalf of the Tioga Company was rejected on the trial, and the question is raised, on page 89 of the present record (fol 161), in manner following.

"The defendant's counsel offered to show: That, at the time this agreement was made, the subject of the "discrimination on account of motive power" was discussed and well understood by both parties to the agreement.

That the phrase "charges by way of discrimination on account of motive power on account of short distances," in the contract, was intended and understood to give to the defendant the benefit of that discrimination.

That the provision in the contract providing that a tariff of rates should be settled and agreed upon every year, by both parties, during the continuance of the contract, was also intended and understood for the benefit of both parties.

That the tariff of rates made and introduced in evidence, embraced the discrimination on account of motive power for short distances intended to be embraced in the words of the contract, and was assented to by both parties, and that during the existence of the entire contract the road was operated by the defendant under that tariff which embraced this discrimination made by the consent of both parties, intended for the benefit of the defendant; and

That no other discrimination was ever made, or ever intended to be made by either party.

The plaintiff's counsel objected to the admission of the proposed evidence.

The objection was sustained by the referee, and the evidence was excluded, to which ruling the defendant's counsel duly excepted.

The defendant's counsel also proposed to prove that the discriminations that were made in the tariff of rates, by consent of both parties, were intended for the benefit of

the defendant, on account of its motive power, and to answer that provision in the contract, as a fact after the contract was made; and that, when the rates were so established, these discriminations were made in the tariff for the benefit of the defendant, and to answer that provision in the contract.

The plaintiff's counsel objected to proof under the offer, which objection was sustained by the referee, and the defendant's counsel duly excepted.

The defendant's counsel also offered to prove that the discrimination and extra charges, made in the tariff of rates for short distances, were made for, and on account of, motive power, for the benefit of the defendant.

To this offer, the plaintiff's counsel objected, first, as incompetent; and secondly, that the defendant's counsel did not propose to prove the proposition by written evidence.

The objection was sustained, and the evidence excluded, and the defendant's counsel duly excepted."

1. It seeems clear that this language had a peculiar and special significance as used in the contract in question which an expert in the management of rail roads might be permitted to explain. Persons not familiar with the cost and detail of rail road transportation could not and ordinarily would not know what was meant by the words employed in the particular and special sense in which they were evidently used.

2. That it was intended in the contract to give the defendant the benefit of the discriminations made on account of motive power for short distances is conceded, but it is claimed that such discriminations only were contemplated as are made outside of the tariff of rates to be agreed upon annually by the contracting parties.

3. In the case decided in the Supreme Court and Court of Appeals of the state of New York it was not made apparent that there was any discrimination in the tariff of rates on account of motive power for short distances. In the present case it clearly appears that such is the fact, and the difference thus resulting is the amount claimed in this action.

   The evidence of Beers, the accountant for the Blossburg Company, who made up the amount of its claims, is conclusive on the point and is as follows (record, fols. 199 to 201):

Cross-examination: What do you mean by difference? That is the difference between what the Corning Company claimed and the Tioga Company paid.

Under what? Under the calculation I have made.

By what reasoning have you calculated the difference? How do you get at it? This calculation I have made on the business of the road.

Upon what principle do you make any difference at all? The freight and passengers.

Had you the tariff rates? Yes, sir.

Did you see any discrimination for freight for short distances or long distances? No, sir.

Wasn't there a discrimination in the tariff on this road between short distances and long distances on account of motive power?

[Objected to, objection overruled, plaintiff's counsel excepted.]

I worked from the tariff. The figures were all made from the tariff rates.

Don't you know that in that tariff there were larger rates paid for passengers and *freight for short distances than long? That is a very common thing.*

I ask if that was not the fact? That was the fact I suppose, but I don't know what it is for.

Didn't the difference in months, you *have shown here, result from that discrimination? Yes, sir, it resulted from* the difference of the calculation of the two parties.

In making this calculation you had this tariff between these two roads before you, was there not in that tariff a discrimination, and wasn't there a larger charge for freight and passengers and freight for short distances than for long? Certainly.

Wasn't the difference you produce the result of that discrimination? Oh, certainly.

Re-direct examination by Mr. Rumsey:

You say there is a difference in the tariff of rates in long and short distances? I believe they charged more per mile for short distances; it is customary with all rail roads.

Do you know upon what basis the Tioga Company, in rendering their accounts, calculated the amount that was to be paid the Blossburg & Corning Company.

[Objected to.]

I know what their statement was.

This is one of the statements rendered by the company? [presenting paper to witness.] Yes, sir.

Does that paper show that in estimating the amount to be paid to the Blossburg & Corning Company, they figured it from the basis of the price from Blossburg to Corning?

[Objected to.]

Both parties here agreed to the following statement, dictated by the referee.

The defendants pay to the plaintiffs two-thirds (⅔) of the amount received for all freight transported over the plaintiff's road at the rates established in the tariff of prices, agreed upon between the parties for the transportation of freight over the whole length of both roads.

The plaintiffs claim that they are entitled to two-thirds (⅔) of the earnings over their road according to the tariff of rates for short distances, as well as over the whole road.

The defendants claim that this difference is the discrimination made in the tariff for short distances for motive power, and is therefore excluded from the receipts by the terms of the contract.

And of folio 191, we have the following.

"Being again *Cross-examined* by Mr. Reynolds he testified as follows:

And doesn't the difference of $39,064,44, result from a discrimination of rates of freight between the whole distance and short distances on the line of that road?

[To this question, the plaintiff's counsel objected. The objection was overruled, and the evidence was received, and the plaintiff's counsel duly excepted.]

A. That is the difference in figuring. I can't answer any differently.

Isn't there, in the tariff, a discrimination between rates per mile, between long and short distances? I think there is, but I haven't tested that.

Have you made up all this account without reference to the tariff? No, sir.

Can't you tell from that whether there is a discrimination in the tariff between long and short distances? I haven't had any thing to do with that.

If you know upon what principle you have figured, tell me how this difference arises? It is the difference in the construction of the contract.

If the same rates of freight were in that tariff, in long and short distances, would there be any difference between these companies? I think not

Then, is not the entire difference the result of a dis-

crimination in the rates per mile between long and short distances? Yes, sir.

The discrepancy arises from the different tariff rates in long and short distances? I think so.

The statement of computation of the witness was offered in evidence by the plaintiff's counsel, which was received and read in evidence, and the amount therein was the same reported by the referee on that point, and the correct amount upon the principle on which the referee based his report in favor of the plaintiff."]

4. The proof offered did not infringe the rule which forbids the admission of parol evidence to vary the terms of a written contract. It sought only to place the court in the position and surroundings of the parties when the contract was made, and enable it to apply the words, "discriminations on account of motive power, for short distances," as the parties intended — that is; to discriminations made in the tariff of rates for the benefit of the Tioga Company by the agreement of both parties by mutual consent; or to some fabulous special contracts for the transportation of saw logs, outside of any tariff rates made or agreed upon by anybody.

Greenleaf Ev. (12th Ed.), §§ 280, 282, 286, 290.
Redfield on Wills, §§ 39, 40, 41.
Miller v. Travis, 8 Bing., 244.
Doe v. Needs, 2 M. and W., 129.
Atkinson v. Cummings, 9 How., 479.
Clough v. Bonman, 15 N. Hamp., 504.

(*a*). It was the obvious intention of the parties that the Tioga Company, should in some form receive the benefit of discriminations made in the operation of the road on account of motive power for short distances, and they were not to be regarded as "receipts" for which it was to account under the contract. That such a discrimination does appear in the tariff of rates is now beyond question although denied by the Blossburg Company, in its suit in the New York courts.— There is nothing to show that in any other place or form any such discriminations were made,— the isolated and perhaps fabulous case of saw logs not excepted. They may have been and doubtless were in one or more cases transported at "special" rates agreed upon by the shipper and the Tioga Com-

pany. There is nothing to show that the idea of discrimination for short distances ever entered into any such contract. It has therefore been contended on behalf of the Tioga Company that the discriminations to which the contract referred were in the tariff of rates agreed upon between the parties and were not to be regarded as "receipts" in which the Blossburg Company ought to participate.

(*b*). It is not denied by anybody that the charges made by way of discrimination for short distances was intended for the benefit of the Tioga Company, by which all the motive power required under the contract, was to be, and was furnished. It is now agreed that such discriminations were in fact made in the tariff, and never elsewhere. And the Tioga Company has contended that, by the proper construction of the very words of the contracts, charges made for that reason were no part of the "receipts" to be divided under the contract. It has been claimed and decided otherwise and we seek by evidence to simply *apply* the language of the contract as the parties in fact intended.

(*c*). As this language of the contract, had application to a special occupation or business, the evidence of persons skilled in the particular calling was admissible to give them the proper meaning as the parties intended.

1 Greenleaf Ev. (12th Ed.), §§ 280, 288.

(*d*). The proposition is kindred in principle to that in the case of a testator who had devised his manor of S. to A. B., and had two manors, of North S. and South S., where parol evidence was allowed of the intent of the testator as to which of the two manors should pass by the devise. This is what Lord Bacon calls "an equivocation" as the words apply equally to either manor, and evidence can be received to denote which was intended and when that is known, the general words used can have their proper application.

1 Greenleaf Ev. (12th Ed.), §§ 289, 290.

(*e*). It is also to be observed that there is in the evidence offered no attempt to change the language of the contract, but only to show to what particular detail in the operation of the rail road of both parties under the contracts they properly applied.

1 Greenleaf, supra, §§ 287, 288.

For the numerous errors pointed out the judgment below should be reversed and a *venire de novo* awarded.

JOHN H. REYNOLDS,
Of Counsel for Plaintiff in Error.

APPENDIX (A).

United States Circuit Court.

THE BLOSSBURG AND CORNING RAILROAD CO.,

against

THE TIOGA RAILROAD CO.

The following contains the points decided:

I. I decide that defendants are liable to pay to plaintiff under the contracts set forth in the pleadings, the proportionate share of the plaintiff of all moneys received by defendant according to the tariff of rates without any deduction therefrom. The additional charges by way of discrimination for short distances for motive power which by the contract are not to be regarded as receipts are charges outside of the tariff of rates. This decision is based: 1. Upon the authority of the case between the same parties in the Court of Appeals reported in 1 Keyes, 486.

2. That the adjudication in that case is conclusive upon the parties upon the question of the construction of the contract.

II. I decide that the record in that case is not a bar in favor of the defendant.

1. Because the claim in this action for differences from Dec., 1852, to June 1, 1854, was not owned or held by the plaintiff at the commencement of that action.

2. Because the claim for the differences from June 1, 1855, to Oct. 15, 1862. had not accrued at the commencement of that action and could not therefore have been included therein.

III. Upon the question of the statute of limitations, I think I am concluded by the decision of this court upon the demurrer. That decision was based upon the authority of Olcott against the Tioga Rail Road Co., 20 N. Y., 210, which is understood to hold in effect that a foreign corporation cannot avail itself of our statute of limitations, because by its constitution, its locality is fixed out of the state, and cannot come within the state. Although the fact that the principal office of business of the defendant was in this state, and its managing officers were here, where according to existing laws, it might have been sued was not alleged or contained in the pleadings upon which this court made its decision, yet looking at the reason for the decision, I do not see that if the fact had been alleged the result would have been different. Sitting as a referee, I am not

at liberty to disregard this decision and if I am mistaken as to the principle intended to be decided the court can easily correct the error. I do not express any opinion upon the point.

IV. The following items make up the amount of my report:

Differences from Jan. 1, 1855, to Oct. 15, 1862, less $135.56, for errors,		$38,921.88
Interest computed as proved to Nov. 1, 1862,		11,214.83
Interest on $38,921.88, from Nov. 1, 1862, to March 10, 1871,		20,055.57
Add one year's interest on $38,921.88,		$2,724.53
Differences from Dec. 1, 1852, to June 1, 1854,		8,891.02
Interest as proved to March 1, 1863,		5,893.81
Interest on 8,891.02, from March 1, 1863, to March 10, 1871,		4,996.25
Damages for not keeping road in repair,		
Defective iron rails,	$1,032.62	
Defective ties,	720.00	
Defective fences,	250.00	
Cutting brush,	250.00	
		2,252.62
All other items are rejected,		$94,950.51

S. E. CHURCH,
Referee.

SUPREME COURT OF THE UNITED STATES.

THE TIOGA RAIL ROAD COMPANY,
Plaintiff in Error,
against
THE BLOSSBURG AND CORNING RAIL
Road Company, Defendant in Error.

No. 250.

SUPPLEMENTAL BRIEF AND POINTS FOR PLAINTIFF IN ERROR IN REPLY.

FIRST. It appears beyond any controversy that in the tariff of rates agreed upon between the parties, under the contract, *discriminations were made on account of motive power for short distances.* This appears by an inspection of the tariff itself, and is conceded, and it is equally clear by the contract that charges made on that account were not to be included in the term "receipts," as mentioned in the contract for which the Tioga Company were to refund to the Blossburg Company; and yet a recovery has been had in this case for just that discrimination in money.

(1). No other discrimination of that kind was ever made during the existence of the contract, and unless the Tioga Company can have the benefit of it as disclosed in the tariff of rates under which the road was operated for the entire term of ten years, it is deprived of a very important and substantial right, plainly intended to be secured to it.

(2). The pretense so persistently put forth that the evidence of Stearns (fol. 131), tends to show that any discriminations on account of motive power were made outside of the tariff of rates is utterly groundless. He only says, "we charged customers for loading and unloading, and for warehousing in addition to the rates stated in the tariff of rates," and this evidence plainly excludes the idea that there was any outside dis-

crimination for short distances on account of motive power.

The counsel for the Blossburg Company, as a witness, desired that it should be regarded otherwise, but the effort failed in the following manner, to wit: When being examined with respect to the former suit decided in the Court of Appeals of New York, claimed as an estoppel, he was asked this question (fols. 194, 195); "was there any proof given in that trial to show that outside the tariff of rates, there was any discrimination made?" "Yes, sir; Mr. Stearns testified on that trial that they ran saw logs over the road under a special contract, and he testified also—" "Is that in the record there?" "No, sir; he testified they made special contracts for running saw logs outside the tariff of rates." "That is not the question. The question is, was there any evidence given to show that there was any discrimination made outside of the tariff of rates?" "Simply that they made bargains for transporting timber outside the tariff of rates. Then there was the evidence of Mr. Stearns. He testified that we,"—"Was there any evidence on that trial that showed any discriminations for short distances outside of the tariff of rates?" "Yes, sir, there was" (fol. 195). What was that evidence?" "*That was the testimony of Mr. Stearns in regard to the saw logs.*" "*Did this testimony in regard to saw logs have any reference to short distances or long, or was it only special rate to carry that tonnage over the road?*" "*That is all, sir.*" * * * * * * * "*Did Stearns pretend that that was a discrimination for short or long distances, or was it simply for that particular freight being carried over the road?* "*That was all, sir; and it was offered simply for the purpose of showing that they did not confine themselves to the tariff of rates in regard to all property*" (fol. 196).

(3). It is therefore made entirely clear that the only discriminations ever made or acted on with respect to motive power for short distances, were included by agreement of both parties in the tariff of rates, and that the Blossburg Company, in the court below, recovered for the amount of these discriminations, against the very terms and intention of the contract. The counsel for the Blossburg Company, is compelled to admit that charges by way of discrimination on account of motive power for short distances were intended for the benefit of the Tioga Company,

who furnished all the motive power and operated the road, but he rests upon the feeble allegation that the intended discriminations on account of motive power which were intended to compensate the Tioga Company, were only these made *outside* of the tariff of rates, when he is compelled to admit, as a witness, that none such *were ever in fact made*. It will seem to be a strange result if the Tioga Company shall lose the benefit of a just provision of the contract, to which all agree that it is entitled, by any seeming indirection or apparent technicality. The law will not permit it, as is confidently believed.

(4). The learned counsel for the Blossburg Company is also forced to admit that it was proper that a uniform tariff of rates should be agreed upon by both parties under the contracts, and that it was *especially* due to the Blossburg Company, with reference to *its* compensation. To this we agree; and may add it was also of *especial* interest to the Tioga Company, with respect to *its* compensation. Both roads were to be run together as a single line of traffic. It was not important for the public to know anything more, than the tariff rates for the transportation of passengers and freight from one point to another, and how the receipts were to be divided between the two corporations was of no interest to any one but to themselves. That was regulated by the contract upon an intelligent consideration of their respective interests by which a compensation to the Tioga Company, on account of motive was duly considered.

(5). It is agreed by counsel that uniform rates of toll and charges to be agreed upon means "not changeable and not variable." (Point *Third* of defendant in error (a)), and yet in almost the next sentence it is said that the Tioga Company was at liberty to change it, as there is nothing to show that "these tolls and charges are to be kept at the same rate per mile over both roads" ((b). Point *Third* of defendant in error).

It will be difficult to see why a uniform tariff of rates was to be annually agreed upon, by the parties if the company operating the road might disregard the tariff in the next moment. The roads were in their operations under the contract consolidated, and in fact made one.

The tariff is supposed to have been fixed, under the contract with reference to a continuous traffic between

Corning and Blossburg, tending to the mutual profit of both companies. The notion that it might under such circumstances be changed by the Tioga Company for transportation over its own part of the consolidated road, appears to be absurd, and if it had been done to the injury of the traffic on the entire line, the Blossburg Company would have had just ground of complaint.

(6). It is entirely true that the Blossburg Company had no interest in fixing the tariff of rates over the entire lines, except with respect to its own compensation for the use of its road, and that was done, with respect to the operation of both roads as consolidated, in which compensation was intended to be made, and was made, to the Tioga Company on account of motive power for short distances. But how can it be truly said that when, in the tariff of rates, both parties had agreed upon the discrimination on account of motive power for short distances, that the Tioga Company was at liberty to change the tariff at its pleasure.

If so the agreement upon a tariff was idle and unmeaning.

(7). The circumstance that the provision that "the expenses charged customers for the loading and unloading coal, and other freights for warehousing, etc.," stand in connection with the provision for discrimination in regard to motive power, etc., is not of any importance. Such charges must, in the very nature of things, be occasional and exceptional, and could not be subjected to the arbitrary rule of a permanent tariff. But charges by way of discrimination for short distances for motive power, necessarily formed a part of the tariff under which the road was to be operated, and this is illustrated by the tariff agreed upon in the case.

(8). The learned counsel for the defendant in error ventures the assertion (Points for defendant, page 8, b.), that "it is evident that the discriminations for motive power which are not to be included in the term receipts, for the purpose of division, are *outside* the uniform charges referred to," and this is said upon undisputed proof that no such "*outside*" discriminations were ever made, and, upon equally conclusive proof that they were made and included in the tariff agreed upon by the parties themselves, under the contract,

and under which the roads were operated by the Tioga Company during its entire period.

(9). Much stress is put upon the words, "*additional charges*," which are duly italicized in the brief, and counsel fervently asks "additional to what," and answers his own question thus: "They are clearly not additional to the charges for loading and unloading freights, etc., for *all* those charges are expressly declared not to be receipts for division." The discriminations on account of motive power for short distances are also expressly declared "not to be receipts for division," and they are not "*additional*" to the tariff of rates, for as is now agreed, they are included within it, by the agreement of the parties, and they were never made elsewhere. The fact was not only proved by the Blossburg Company, but the Tioga Company offered to prove that such was the intention of the parties when the contract was made.

(10). It is quite true that the tariff of rates does not in words say that in it. Discriminations are made for motive power for short distances, but the fact that discriminations are made with respect to distances is apparent. A reference to the contract shows why they are made, and they can be referred to but one source, and that is motive power, and but for that, the discrimination in the tariff is without sense or reason. But counsel naively suggests that if he may "guess," some discriminations, are contained in the tariff of rates, they are not the discriminations which are "*not* to be receipts for division" (Points for defendants in error, page 8, c.). Pray tell us what they are? No discriminations were provided for in the contract, save these on account of motive power for short distances, and the "receipts" on that account were not for division. These discriminations were in fact in the tariff and not elsewhere, and for the "receipts" on that account the Blossburg Company recovered in the court below. This case was decided below, not upon any intelligent consideration but upon an estoppel, which rests upon ignoring truth.

SECOND. The general rule that a judgment of a court of competent jurisdiction between the same parties upon the point litigated is conclusive in all subsequent litigation where the *same matter* comes directly in question, may, in a general

sense, be admitted; but to this rule there must of necessity be very many exceptions.

(1). The "same matter" disposed of in the Court of Appeals of New York, does not come in question here. That "matter" was a claim arising, or said to have arisen, between the 1st day of June, 1854, and the 1st of January, 1855. No portion of which claim is embraced in this action. It is true that the claim arises under the same contract, but that circumstance is not of consequence if this court is not concluded by its construction in the courts of New York, which it clearly is not under the decision in Swift vs. Tyson, 16 Peters, 1, *et seq.*, per Story, J., and Chicago vs. Robbins, 2 Black, 418–428.

(2). It may well be that a New York court might follow the decision relied on, without considering whether in principle it was right or wrong, upon the ground of *stare decisis* or *res adjudicata*, but this court is not thus restrained, and will give its judgment according to the truth of the case, and a just construction of the contract. It would seem very strange if this court is bound by an erroneous judgment of a New York court, given upon a construction of a contract when that construction may be reconsidered here, and when "the same matter" to which the amount claimed between the 1st of June, 1854, and the 1st of January, 1855, is not in controversy. Counsel seem to confuse the same matter in the former suit which was recovered upon an erroneous construction of the contract with a proper construction of the same contract which this court is at liberty to give upon another "matter" arising under it. The judgment record was offered and received in evidence for the sole purpose of concluding the court below on the *construction* of the contract. This may be the rule when the court in which the record of the prior judgment is recovered is concluded by the construction put upon a contract by the court in which the first judgment was given, but that cannot be the rule in this case, if this court may, notwithstanding the judgment of the Court of Appeals of New York, put its own construction on the contract and render judgment accordingly.

(3). Moreover it is not easy to see that the *same question* was decided in the New York courts. The recovery there was had upon the ground that the *tariff of rates*

did not show any discrimination on account of motive power for short distances, and there is no evidence in that record, showing that fact, whereas in this case the evidence shows beyond any contradiction, and the recovery was had for the amount of such discriminations contained in the tariff of rates, and which the Tioga Company claimed the right to retain under the provisions of the contract. If this is not a correct statement of the condition of things the evidence of the counsel for the Blossburg Company who tried both causes must be regarded as unmeaning.

THIRD. The antiquated rule, that a corporation cannot migrate must now be regarded as a legal fiction rather than a substantial reality. In actual practice, corporations created by the laws of one state do travel into other states, carry their property, establish offices, locate agents, transact business and accumulate money, and they are recognized outside of the territorial limits of their creation as legal beings, having legal rights, if not of protection, they are at least accorded the privilege of being plundered according to the forms of local law.

(1). It cannot now be denied but that natural and artificial persons, are, in respect to legal rights, in a very large degree, placed upon the same footing. The boasted flexibility of the common law, of necessity, adapts itself to this condition of things, and the courts must protect rights which have grown up with a state of civilization, unknown in the early history of the common law of England, and unanticipated, in any survey of the future, by any of the great jurists of the earlier days.

(2). To say that a corporation created by the laws of one state, is incapable of getting into another for the purposes of trade and traffic, for the acquisition of property, for the enforcement of rights, and the protection against wrong is simply untrue, in point of fact, as every judge and lawyer in the union well knows.

It was at one time questioned in this court, whether a corporation created by the laws of a state, made the corporate body a citizen of the state creating it, when the corporators actually resided beyond its territorial jurisdiction, within the meaning of the act of congress in respect to the removal of causes from a state to a federal court for trial. It is now the settled law of this court, that a corporation is a *citizen* of the state

creating it, and entitled to all the rights and immunities accorded to a *citizen* by the constitution and the law.

R. R. Co. v. Letson, 2 Howard U. S., 497.
Stevens v. Phœnix Ins. Co., 41 N. Y. R., 154.

(3). If it be, as it must be, assumed that a corporation is a citizen of the state by which it is created then it must be accorded the rights of a citizen in all courts and places. Even this case could never have got into the courts of the United States, except upon the acknowledged proposition that the Tioga Company came into the state of New York, in some tangible form and was sued in its local courts as a citizen of Pennsylvania, traveling for pleasure or profit, and as a citizen of another state appealed for a fair trial to the federal courts for relief against the judgment of local tribunals which had worked injustice, and it must follow that the plaintiff in error is, in this court to be regarded a citizen of the state of Pennsylvania, and entitled to demand all the protection which any citizen of any state may demand under the constitution and laws of the United States from the evil consequences of any general or local law of any unfriendly state in the union.

(4). It is said that it is a "legal impossibility for the plaintiff in error to depart from the state of Pennsylvania, nor could it come into, exist in, or depart from the state of New York It must, from its very organization, *remain continuously out of* the state of New York."

The question is how it got within the state of New York for the purpose of being sued? It could not be sued *outside* the territorial jurisdiction of the state of New York in its courts under any law, state or national. To give a state court jurisdiction, the defendant must, in some form, come within its limits, and it does not necessarily become a citizen or resident of the state, because it has officers and agents, and has property and transacts business within it. All this is done every day by citizens of other states and they do not thereby lose their citizenship in the other jurisdiction.

(5). There is certainly no greater reason for this court following the statutes of the several states of the Union, or the decision of their courts in respect to the limitation of actions than the laws and decisions respecting the validity of bonds in aid of railroads or any other local improvements.

JOHN H. REYNOLDS,
Of counsel for plaintiff in error.

Supreme Court of the United States.

The Blossburg & Corning Railroad Company, D'f'ts in Error, ~~Action~~ *vs.* The Tioga Railroad Company, Pl'ff in Error.	No. 250.

ABSTRACT AND BRIEF FOR DEF'T IN ERROR.

The statement of facts made by counsel of the plaintiff in error so far as he states the facts.

The conclusions which he insists upon in his statements as resulting from the language of the contract set out in the pleadings, and from the tariff of rates given in evidence, are not conceded by the defendant in error.

The following facts appear in the case beyond those stated by the plaintiff in error :—

1. In the month of January, 1855, the defendant in error commenced an action in the Supreme Court of New York against the plaintiff in error, upon the same

contract set out in the pleadings in this action, to recover a portion of the compensation to be paid to the defendant in error which had before then been retained by the plaintiff in error up to that time. That such action was referred to Hon. Daniel S. Dickinson, and tried before him, who made a report in favor of the plaintiff therein. The referee on that trial adopted the same rule of construction of the contract, which was adopted by the referee on the trial of this action, and which is now insisted upon by the defendant in error.

An appeal was taken by the plaintiff in error from the Judgment entered on such report, to the General Term of the Supreme Court of New York, by which the Judgment was affirmed.

A further appeal was taken by the plaintiff in error to the Court of Appeals of New York, by which the Judgment was again affirmed. A copy of the Judgment Roll in that case is printed with the papers in this action.

After the determination of the action in the Court of Appeals of State of New York, the defendant in error took no further action to recover on the contract until the ten years for which it was to run expired, when he commenced this action.

2. In this action the plaintiff in error, amongst other things, pleaded the statute of limitations existing in the State of New York, to which the defendant replied that plaintiff in error was a corporation foreign to the State of New York. A rejoinder and surrejoinder followed, and resulted in a demurrer on the part of plaintiff in error. The question on that demurrer was, whether the statute of limitations of New York was an available defence in favor of a foreign corporation, which question, after argument in the Circuit Court, was decided in favor of the defendant in error. The plaintiff in error then pleaded over. That opinion is reported as

The Blossburg & C. R. R. Co. vs. The Tioga R. R. Co., 5 Blatchford, C. C. R. 388.

BRIEF AND POINTS FOR DEF'T IN ERROR.

FIRST.—The papers, &c., produced and offered in evidence from folio 70 to 75, established the right of the Blossburg & Corning Rail Road Company, as the assignee, both in fact and in law, of the Corning & Blossburgh Rail Road and its franchises, and of the several contracts set out in the declaration.

1. This title of the defendant in error is expressly admitted by the plaintiff in error as appears from printed papers.

   See admission at fo. 74.

2. As assignee in fact by the assignments recited from the Corning & Blossburgh R. R. Company to John Magee and from John Magee to the Blossburgh and Corning R. R. Co., the defendant in error.

   See fo. 73, 74.

3. As assignee in law under the judicial sales on the foreclosure of mortgages and under judgments also recited in the papers.

   Same folios, 73, 74.

SECOND.—As such assignee the Blossburgh & Corning Co. had the legal right to prosecute the Tioga Co. for its failure to pay the compensation agreed upon in the contracts or to keep the Rail Road in repair as therein provided.

1. This is the practical effect of the admission contained at folio 74—but if not then :

2. The contracts set out in the declaration is in law a lease of the rail road of Corning & Blossburgh R. R. to the Tioga Rail Road Company.

a. The compensation for the use of the railroad, water stations, &c., although not an absolute sum, is still rent within the legal definition of the

term. It can easily be reduced to certainty by either party.

2 Bouvier's Law Dic., title rent.
2 Washburn on real property, 5, § 3.
4 Bacon's Abridgment, 335 marginal.

b. The only object of having rent certain is to enable landlord to distrain, and that right having been abolished in New York the necessity for having it certain is gone with the right.

3. The Blossburgh & Corning Co. having thus become the absolute owners of the reversion of the leased property, with the reversion took the lease.

1 Washburn on real property, 336, sec. 8, 9.
Burden vs. Thayer, 3 Metcalf, 76.
Van Rensselaer vs. Gallup, 5 Denio, 454.

a. To entitle the Blossburgh & Corning Co. to recover on the lease in its own name for the rents or any of the rights it is entitled to under the lease, it is not necessary the Tioga Co. should attorn to it. The statute of Ann has been enacted by State of New York.

1 Rev. Stat. N. Y., 739, marg., sec. 146.
Moffatt vs. Smith, 4 N. Y. Rep. 126–8.
1 Rev. Stat. N. Y., 747, sec. 23, 24.

b. A covenant to repair is one which runs with the land, and the assignee of the lessor, either in law or in fact, may recover upon it in his own name.

Demarest vs. Willard, 8 Cowen, 206–10.

c. The assignee of the lease only, who has been recognized as such by the tenant, may sue in his own name for the rent, although he has no interest in the reversion.

Moffatt vs. Smith, 4 N. Y. Rep., 126.

And in this case the tenant has paid to assignee the rent according to its construction of the contract. The controversy is only for balance.

d. The assignee of the rent only, without the reversion, may sue in his own name for subsequent accruing rents.

Demarest vs. Willard, 8 Cowen, 206.
Willard vs. Tillman, 2 Hill, 274.
1 Rev. Stat. N. Y., 747, sec. 23, 24.

THIRD.—The rule of construction of the contract under which the plaintiff below sought to recover and which was adopted by the referee and approved by the Circuit Court when it refused to set aside the report of the referee, was the correct one.

1. As the plaintiff below was to receive its compensation for the use of its railroad depots, engine houses, water stations, machine shops, grounds, &c., from the receipts over their road, it had a direct interest in seeing to it that such fair "rates of tolls and charges for transportation" on the roads were adopted as should yield them a fair compensation, and the contract therefore, at folio 254, provides that "uniform rates of toll and charges for the transportation of passengers, mails and freights on and upon the said railroads shall be established annually by the mutual agreement of the said companies," and in case of disagreement, they are to select others to do so. The only possible object the plaintiff below could have in taking part in fixing those rates was with reference to its compensation.

a. These rates of toll and charges are to be uniform, which means, simply, "not changeable and not variable." In other words, the rule by which the compensation of the plaintiff below was to be determined, was to be kept at the same rate agreed on in the tariff.

b. There is nothing in the language used to warrant the inference that these tolls and charges are to be kept at the same rate per mile over both

roads. The provision shows that it was not so intended, for, if it was, all the parties would have to do would be to agree upon the rate per mile for each passenger or article of freight, without providing the rate at which it should remain uniform from point to point on the line of the roads. The agreement could then have provided that plaintiff below should have two-thirds of such rate per mile and have saved all question. Because such was not the intention, the parties agreed on the charges for transportation without regard to any rate per mile or any uniformity except the annual uniformity referred to in the contract.

c. The plaintiff below had no interest in having a a voice in fixing any other charges upon the roads, except those from which its compensation for the use of its railroads, &c., were to be determined, and, therefore, by the contract the tariff of rates is to provide only for transportation of passengers, mails and freights, and for that only does the tariff of rates provide. Such other charges as the Tioga Company may make over the road, the plaintiff below is to have no interest in, and they are therefore left to the discretion of the Tioga Company. The Tioga Company did make such other charges—(See Stearns' evidence fo. 131)—and that such was the intention of the parties is evident from subsequent provision of the contract hereinafter referred to.

d. It is no answer to this to say this clause was inserted to prevent the Tioga Company from injuring the business of the railroads by overcharging. Its own interests would indemnify against any such action. But if it was so disposed, this provision does not prevent it to any extent. The right confessedly reserved to the Tioga Company to charge for loading, unloading, &c., and

such "*addition*" charges for discrimination, &c., enable it to put any charges it may choose in the business of the railroads.

2. The contract then, in settling the amount to be paid plaintiff below, provides: "And for the use of the railroad of the said Corning & Blossburgh Rail Road Company and the use of their depots, engine houses, machine shops, grounds, water stations, &c., the Tioga Rail Road Company agrees to pay to the Corning & Blossburg Rail Road Company two-thirds of all receipts for passengers, mails and freights which shall be taken for the said Corning & Blossburg Rail Road, the expenses charged customers for the loading and unloading coal and other freights, and for warehousing, *and such additional charges by way of discrimination as shall be made for short distances for motive power* not to be included in the term receipts above mentioned."

a. Under the first part of this provision the Tioga Company would be required to pay the plaintiff below two-thirds of all receipts for freights, &c., over the Corning & Blossburg Rail Road from whatever source derived, and to guard against this construction the last clause is added to restrain such manifest effect of the first clause. It does in terms, except from the term receipts as used in the first clause, the charges for loading, unloading coal and other freights, for warehousing, and such additional charges by way of discrimination, &c. It is really difficult to perceive upon what principle the charges for loading and unloading freights, and for warehousing, are excluded from, and the charges for additional discriminations are included in the tariff of rates. They are all used in the same sentence in direct connection with each other, and upon every rule of construction should share the same fate.

b. From the very language of the contract it is evident that the discrimination for motive power which are not to be included in the term receipts for the purpose of division, are *outside* the uniform charges referred to. They are spoken of as "*additional charges.*" Additional to what? They are clearly not additional to the charges for loading and unloading freights, &c., for *all those* charges are expressly declared not to be receipts for division. They must, therefore, be *additional* to the uniform rates of charges for transportation agreed upon in the tariff of rates, and it would be an abuse of language to give to it any other construction. This is the reasonable construction which was given to this very clause by the Court of Appeals of New York between these same parties.

Blossburg & C. R. R. Co. vs. Tioga Co., 1 Abb. Ct. of Apps. Decis., 149.
S. C. 1 Keyes, 486.

c. There is no intimation in the tariff of rates that any amount included therein is for discriminations for motive power—that is first referred to in this latter clause—but if we are to intend or guess that some discriminations are contained in the tariff of rates, those are not the discriminations which are not to be receipts for division. The discriminations that are not to be receipts are such *additional* charges for discriminations, and if it means anything it means additional to those in tariff of rates.

d. If there be any doubt as to the construction of a contract, that construction is to be adopted which is most beneficial to the covenantee.

Marvin vs. Stone, 2 Cowen, 781, 806.
Connor vs. Hendersen, 15 Mass., 319.
Judkins vs. Earl, 7 Greenl. 9.

3. Assuming that the tariff of rates includes only what it purports to include—charges for transportation and nothing else—the plaintiff below was entitled to two-thirds of the amounts received by virtue of that tariff, thus :

a. By the tariff of rates the charges for the transportation of 1,000 feet of lumber from

Lawrenceville	to Corning,	15	miles,	85	cts.
Lindley	to "	12½	"	75	"
Cook's Turnout	to "	11½	"	65	"
Erwin Centre	to "	8½	"	60	"

and the plaintiff below is entitled to two-thirds of those rates on the article transported from these points to Corning, for these are the receipts which, under the uniform rates agreed on, are taken for the Corning & B. Railroad. This calculation is, of course, on the assumption that charges for loading, &c., and discriminations, are not included in the tariff of rates. This, we insist, is the fair interpretation of the contract.

b. If, however, the above is not to be taken as the fair construction of the contract, and we are to assume that the other items which are not to be termed receipts for the purposes of division, viz : loading, warehousing, and discriminations, or any of them, are to be treated as embraced in the tariff of rates, upon what principle is the plaintiff below entitled to pay ? We contend that we should take the uniform rate agreed on in the tariff from Lawrenceville to Corning, those points being the termini of the Corning & Blossburgh Railroad, and the plaintiff be allowed two-thirds of the amount charged between these two points and in same proportion for shorter distances. The distances from the various points on the C. & B. Railroad are as hereinafter stated, and the

tariff rate per 1,000 feet on lumber from Lawrenceville to Corning is 85 cents, which is equal to 5 67-100 cents per single mile, thus :

Lawrenceville, 15 m., 85 cents of which 2-3 is 56 67-100.

Lindley, 12 1-2 m, 5 67-100 cts per mile, 70 87-100 cents, of which 2-3 is 47 25-100.

Cook's, 11 1-2 m., 5 67-100 per mile is 65 20-100 cents of which 2-3 is 43 47-100.

Erwin Centre, 8 1-2 m., 5 67-100 per m. is 48 19-100 cts., of which 2-3 is 32 13-100 cts.

This calculation adopts a uniform rate per mile over the Corning & B. Railroad and gives to the Tioga Company all the benefits of any discriminations for motive power over that road that can by any possibility be in the tariff rates. If any calculation is to be made, based upon the presumption that the discrimination for short distances are contained in the tariff rates, this should be the one, for it gives to the Tioga Company all the discriminations there can be claimed to be on or over the Corning & B. Railroad.

c. There is still another way in which the amount due the plaintiff below may be computed. Assuming that the alleged discriminations for short distances are embraced in and form part of the charges for transportation as agreed upon in the tariff of rates. ascertain the point from which each article was carried—the average rate per mile allowed by the tariff of rates for transporting it from that point to Corning, and allow the plaintiff below two-thirds of that average rate per mile for the distance it was actually carried over the C. & B. Railroad. This 1,000 feet of lumber comes on the railroad at Mill Creek to be taken to Corning. Mill Creek is 25 miles from Corning, and the tariff rate from there to Corning is $1.20, being at an average rate per mile for

the whole distance of 4 80-100 cents. It passes 15 miles over the Corning & B. Railroad, which at 4 80-100 cents per mile is seventy-two cents for transportation over that road, of which sum two-thirds is 48 cents, and upon this same rule for every mile the 1,000 feet of lumber or other article is carried over both roads or over the C. & B. Road when it is not carried at all on the Tioga Railroad. *This was the rule adopted by the referee in his decision of the case*—(see evidence of Beers at folio 187 and 189)—and give to the Tioga Co. the benefits of all discriminations that can be said to attach *to the particular article transported*, and allows it all the doubts there are about the true construction of the contract. This construction can hardly be said to be consistent with the rule which requires, in case of doubt, the construction should be that which is most beneficial to the covenantee.

FOURTH.—The question arising upon the construction of this contract as to the measure of compensation to which the plaintiff below was entitled under it, is no longer an open question between these parties—as to them it is *res adjudicata*.

a. A judgment of a court of competent jurisdiction, between the same parties, upon the point litigated, is conclusive in all subsequent litigation where the same matter comes directly in question.

Thompson vs Roberts, 24 How., U. S. R. 233.
Demarest vs. Day, 32 N. Y. R., 281.
White vs. Coatsworth, 2 Selden, 137.
Supervisors of Onondaga vs. Briggs, 2 Denio, 26.
Doty vs. Brown, 4 Comstock, 71.
Gardner vs. Buckbee, 2 Cowen, 120.

b. The rule is that the judgment of a court of competent jurisdiction directly upon the same point

and between the same parties, is conclusive when given in evidence, and it may be so given in evidence although not pleaded.

Thompson vs. Roberts, 24 How. U. S., 233.
Lawrence vs. Hunt, 10 Wend., 80. Aff'd 24 Howard, 241.
1 Greenleaf ev., sec. 531, and cases cited in note 2, p. 700.
Dorrs vs. McMichael, 6 Paige Ch., 139.
Keene vs. Clark, 5 Rob. Supct. Rep., 38.
Belts vs. Starr, 5 Cowen, R. 550, 553.
Warren vs. Comings, 6 Cush., 103, 104.

In Thompson vs. Roberts, *supra*, the pl'ff offered the record without having pleaded it. So also in Keene vs. Clark, *supra*, and in Hopkins vs. Lee, 6 Wheaton, 109. And to the same point see the opinion of the Judges in the Dutchess of Kingston's case, in Smith's Leading Cases, 422.

It would be a strange practice for the plaintiff in his declaration to set out with his contract a former adjudication upon it to sustain his cause of action.

c. It is apparent from the judgment record given in evidence that this same question was directly in issue in the former action, and that practically it was the only question—an inspection of the record shows that fact.

See evidence of Beers in the exceptions with the record, fo. 278–9.
Also the evidence offered by the def'ts counsel in that case from witness Stearns, why the difference was reserved by the Tioga Company, at fo. 279.
Also the exceptions to the report of Hon. D. S. Dickinson, the Referee, No. 10 and 11 at folio 244–5.

"The question was, in the case, whether the parties were to participate in the proportions provided by the contract in all the receipts, for

whatever distances, resulting from the uniform rates agreed on by the parties, and that the additional charges by way of discrimination for short distances for motive power spoken of in the contract, refer only to *additional* charges beyond those contained in the tariff of rates," is the language in which the Court of Appeals of New York states the question.

Blossburg & Corn'g R. R. vs. Tioga R. R., 1 Keyes, 486–7.
See also S. C., better reported in Abbott's N. Y. Ct. of Appeals decisions, vol. 1, page 149.

d. But if the fact that such question was at issue in the former action, does not appear from the record of judgment, it may be proved by parol.

Doty vs. Brown, 4 Comstock, 71.
Gardner vs. Buckbee, 2 Cowen, 120.
Lawrence vs. Hunt, 10 Wend., 80, 84.
Merritt vs. Morse, 108 Mass. R., 270, 275.

And it was proved in this case by the evidence of the witness Rumsey, fo. 192.

The counsel for pl'ff in error seems to draw a strange conclusion from the testimony of this witness. He testified as follows: "*The def'ts* contended there that the pl'ff was entitled only to a *pro rata* estimate on the tariff of rates laid down, in the freights *from Corning to Blossburg and from Blossburg to Corning over the whole length of the road.* The *plaintiff* contended, that it was entitled to all the earnings of the road from the points at which the freights and passengers come on the road, and so far as they were transported *over the Corning & Blossburg Railroad at that rate.* The contract itself provided that they were to have one-third for the expenses of running, and the *plaintiff* was to have two-thirds of the balance in proportion to the distance run over its road"—fo. 192.

There is no doubt from this, what the plaintiff and what the defendant in that action claimed.

Again, "*The defendant* claimed all the way through, that the increased price of carrying freight for short distances over long distances, *was the discrimination for motive power.*"

By the Referee.—*The tariff of rates did not show the discrimination?*

"No, sir. They claimed it did. The plaintiff claimed it did not; *that the discriminations alluded to in the contract were discriminations outside* of the tariff of rates."

Was there any proof on that trial to show that outside the tariff of rates there was any discrimination?

"Yes, sir; Mr. Stearns testified on the trial that they ran saw logs over the road under special contract. * * * He testified they made special contracts for running saw logs outside the tariff of rates," &c., &c., at folio 194–5.

The Hon. referee who tried the case did not appear to have any difficulty in understanding the precise question in controversy between the parties in both actions from the evidence thus given, and he dictated the questions precisely as the witness Rumsey stated in his evidence, and which was agreed to by both parties as correct.

See that statement at end of folio 200.

There was no impropriety in admitting that evidence under the authorities before cited.

If all the parol evidence on this subject was stricken out, the Judgment record furnishes abundant evidence that the same question was in issue then, as to the construction of the contract, as in this case.

e. A Court of competent jurisdiction having given a construction to this contract, in a litigation between these same parties in an action on this contract, the parties are concluded by such judicial construction. It becomes the law of *this case* between such parties on such contract upon the principle of ending litigation. This rule is not affected, even if this court would have given a different construction to this contract, if it was now originally before them for construction between these parties—or if the question was before this court on a similar contract between other parties.

FIFTH.—The plaintiff in error was a corporation organized under the laws of the State of Pennsylvania, foreign to the State of New York. This action having been commenced in the State of New York, for a cause of action (the use of a railroad located in that State) which originated there, the statute of limitations of New York was not a defence against any part of the demand of the plaintiff in error. The United States have never enacted any general statute of limitations.

1. The statute of limitations of New York is six years for actions on contracts, and it is provided, "If, when the cause of action shall accrue against any person, he *shall be out of the State,* such action may be commenced within the terms herein respectively limited, after *the return* of such person into this State, and if, after such cause of action shall have accrued, such person shall *depart* from and reside out of this State, the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action."

Code, section 100.

a. The phraseology of this section of the statute would seem necessarily to imply that it referred

only to persons having the capacity to go out of and return into the State of New York. The court must presume that the legislature, in adopting it, was familiar with the law as to the existence of corporations and their attributes.

2. That a corporation has its existence from, and can have its domicil only within the legal jurisdiction of its origin, and is in its nature incapable of migration from, or to, such place or any other place, has long been too well settled to be disputed.

Bank of Augusta vs. Earle, 13 Peters, 588.
Ohio & Miss. R. R. Co. vs. Wheeler, 1 Black, 286, 295.
Merrick vs. Van Santford, 34 N. Y. R., 208.
Stevens vs. Phoenix Ins. Co., 41 N. Y. R., 149, 52, 3, 4.

a. Such being the *status* of a foreign corporation, it follows that it was a legal impossibility for the plaintiff in error to depart from the State of Pennsylvania, nor could it come into, exist in, or depart from the State of New York. It must, from its very organization, *remain continuously out of* the State of New York.

b. And it was under this rule that the U. S. Courts finally settled the question of its jurisdiction where corporations were parties. Those courts now only enquire where the corporation was chartered, not where the corporators reside, "and no averment or evidence to the contrary is admissible for the purpose of withdrawing the suit from the jurisdiction of the Federal Courts."

Stevens vs. Phoenix Ins. Co., 41 N. Y. R., 154.

"A corporate body created by the law of a sister State can have no corporate existence beyond the limits of the territory within which the law creating it can operate, and that when and where that law ceases to have any force and effect, this

legal entity and mere creature of the law ceases to have any existence," is the language of Justice Nelson in

Day vs. Newark Rubber Co., 1 Blatch., 632. And so is 13 Peters, 588.

3. It was the intention of the Legislature of New York that the creditor should have six years actual residence of his debtor within the State, in which, by the personal service of process, he could obtain a personal judgment before he should be foreclosed of his claim against such debtor. This the plaintiff in error had not and could not have had.

a. Upon the authorities already cited the Tioga Company could not legally or otherwise be in the State of New York, and it must therefore have remained out of that State.

Even in the case of a natural person residing out of the State, it has been held that the time spent by him in the State upon business while so domiciled abroad, is not to be taken into the account as part of his residence in the State, although he had for over seven years directly before commencement of the action a regular place of business in the State to which he came publicly, every day remained during business hours and returned to his residence in New Jersey in the evening.

McCord vs. Woodhull, 27 How., P. R. 54.
Burroughs vs. Bloomer, 5 Denio, 532.

4. Any service upon an agent or officer of the Tioga Company in this State, or any proceeding of the laws of New York against a foreign corporation, *where the defendant did not appear in the action*, would be only a proceeding *in rem* and entirely ineffectual as a means of obtaining a personal judgment against such defendant.

a. The State of New York has always held to this doctrine in proceedings against any of its citizens for foreign divorces, and has also so held in cases of proceedings by citizens of New York against non-residents.

Hulburt vs. Hope Mut. Ins. Co., 4 How., P. R. 275.
Brewster vs. Michigan Cent. R. R. Co., 5 Ibid. 183.
Bank Commerce vs. Rutland R. R. Co., 10 Ibid. 1.

The defendant in such cases, where subsequently brought into court, notwithstanding such proceedings *in rem*, could set up any defense he might have in the case.

These decisions are based upon the rule that corporations exist only in the State creating them, and the officers of the corporation are not the corporation, and do not carry it with them, and when they step over the bounds of the State which is the domicil of the corporation, they become simply private citizens.

For this same reason Judge Nelson set aside the service of process made upon a New Jersey corporation by service upon its president in New York.

Day vs. Newark India R. Co., 1 Blatch., 628.

b. It can hardly be pretended that the Legislature intended to do away with the positive provisions of the statute of limitations, by a provision that enables a creditor to seize the property of his non-resident debtor which happened to be in this State.

c. Much less did the Legislature intend to make one of its positive enactments depend upon the will or the act of a non-resident corporation, as to whether it would allow one of its officers to come into the State, or have a managing agent, or an old car, or some other piece of property within

this State. It might just as well be claimed that such a state of things would avail in favor of a natural person, for the same reason exists in the one case as the other.

5. But the Tioga Company did not have in New York a president, treasurer or secretary, so that a service could be made on one of them, as mentioned in section 134 of the New York code.

a. Shattuck, the witness, (at fol. 131,) was neither of these officers; he was Superintendent of the Tioga R. R. He was not even the managing agent of the Tioga Company. He run the railroad, not the railroad corporation.

b. It is not pretended the Tioga Company had appointed any agent in the State of New York under the statute of that State passed in 1855, upon whom process could have been served in pursuance of the provisions of that statute.

6. The courts of the State of New York having held that a foreign corporation is within the equity of the saving clause of its statute of limitations—see *post*—if this court should now hold that having property, or a superintendent, or an officer, within that State is equivalent to giving such corporation a residence within that State, it would produce some strange results.

a. It would repeal *pro tanto* the New York statute of limitations. Repeals are not and ought not to be thus effected.

b. Such a construction would, if sustained, necessarily take away the right to remove this case into the Federal courts, for being a resident of New York, the Tioga Company had not the right so to remove the action. It has been held otherwise. In Dennistoun vs. N. Y. & N. H. R. R.

Co., 1 Hilton, 62, it was held that a Connecticut corporation, authorized by a statute of New York to purchase and hold real estate and run its road into New York, was not thereby to be deemed a citizen of New York.

Fish vs. Chicago & R. I. R. R. Co., 3 Abb. N. S. 453.

7. The courts have uniformly applied to the statutes of limitations, a liberal construction, and more especially have so applied it to the saving clause in question.

Olcott vs. Tioga R. R. Co., 20 N. Y. R., 223. And cases there cited.
Bulger vs. Roche, 11 Pick. R., 39.
Dwight vs. Clark, 7 Mass. 515.

And it is evident the Legislature of New York intended it should have just the effect it was held to have by the case in 20 N. Y. Rep., for that decision was made in 1859, and the statute in that regard remains unchanged. Even if such intention was not thus manifested, there can be no possible reason for discriminating in favor of a foreign corporation.

The statute clearly will not commence to run against a *natural person* who *never does return* to New York, why then should it be held to run against an artificial person that *never can come* into the State.

The policy of the law is that no persons, natural or artificial, thus situated, shall be allowed to impute laches to their creditors in not prosecuting them in a foreign jurisdiction when they reside or are located in it.

SIXTH.—This precise question, that the statute of limitations of New York is not a defence in favor of a corporation foreign to that State, has been settled by the court of last resort in that State—the Court of Appeals.

Olcott vs. Tioga R. R. Co., 20 N. Y. R., 210.

And this case has been within a few months solemnly affirmed in the same court.

Rathbun vs. North'n C. R. R. Co., 50 N. Y. R. 656.

a. The statute of limitations under which these cases were decided, is identical with the one of which plaintiff in error seeks to avail itself.

2 N. Y. Stat. at large, 307, sec. 90, 309.
Code of N. Y., sec. 90, 100.

b. The effort of counsel for pl'ff in error to distinguish between that case and this is entirely fallacious, for

1. The plaintiff in error was the defendant there.

2. That action was commenced in 1856, and the evidence in this case (fo. 131–2) shows that from 1852 the pl'ff in error had an office, a superintendent, and property in this State.

3. It is, as before stated, idle to suppose that the positive provisions are to be rendered ineffectual by the plaintiff in error leaving property in New York, when it cannot go there itself.

c. The same point has also been fully discussed and decided by the Circuit Court on the demurrer in this very action.

The Blossburg & C. R. R. Co. vs. The Tioga R. R. Co., 5 Blatchford, 387.

SEVENTH.—Such being the construction put upon its statute of limitations by the court of last resort in the State of New York, the Federal courts are required to adopt such construction. Such is the fair meaning of the Judiciary act of the United States.

1 U. S. Stat. at large, 92, sec. 34.
Angel on limitations, sec. 24, and cases cited in notes.

1. Judge McLean says the law of the contract

3 Abbott's Court of Appeals. decisions
1 [illegible]

is the law of the place where it was made and where it was to be executed. This rule of action is found in the different States as it may have been adopted and modified by the Legislatures and the course of Judicial decisions, &c.

Lorman vs. Clark, 2 McLean, C. C. R. 572.

Nor is it questionable that a fixed and received construction of their respective statute laws in their own courts, makes in fact a part of the statute law of the country, *however much we may doubt* the propriety of that construction.

Shelby vs. Gray, 11 Wheaton, 361-7.

We are bound, said Mr. Justice Catron, "to conform to the decision of the State Courts of New York, in the construction of *their acts of limitation*.

Harpending vs. Dutch Church, 16 Peters, 493.
McCluney vs. Silliman, 3 Peters, 270.

And even when the decision of the State court was made after the Circuit Court decision had been appealed from, this court reversed the ruling of the Circuit Court.

U. States vs. Morrison, 4 Peters, 124, 137.
See also the long array of cases cited in note A. to the Judiciary act of 1799, at 1 U. States Stat. at large, p. 92.

Even if this court is not by law arbitrarily required to follow these decisions of the several States, it will so far recognize the doctrine of *stare decisis* as not to interfere with them.

And the only instance to be found where this court has departed from this rule, was in a case where the decisions of the State Courts on the question involved, had been so vascillating as to induce this court to say that following it would be to sacrifice truth, reason and justice.

Gelpcke vs. Dubuque, 1 Wallace, 175.

The decisions of the Court of Appeals have been uniform when the question was before it, and the court say of the case of Faulkner vs. Delaware, &c., Co., 1 Denio, 441, that it was decided without a reference to the authorities or a full consideration of the policy of the act, and should not be followed.

Olcott vs. Tioga Co., 20 N. Y. R. on page 226.

2. The statutes of limitations of the several States are purely local laws—none are more so. The courts of the several States treating such statutes as affecting only the remedy, have paid no attention to the limitations of other States, and have allowed suits upon contracts to be prosecuted or defended only as the same were affected by their own statute of limitations.

Nash vs. Tupper, 1 Caines, 402.
Ruggles vs. Keeler, 3 John. Rep., 263.
Lincoln vs. Battelle, 6 Wend., 475.
Carpenter vs. Wells, 21 Barb., 593.
Toulaudon vs. Lackenmeyer, 6 Abbott N. S., 215.
Power vs. Hathaway, 43 Barb., 214.
Story Conflict of Laws, sec. 577.

EIGHTH.—We offer to show what the parties to the agreement said at the time the written agreement was made on the subject of discrimination for motive power, for the purpose of showing what was intended by that term or phrase in the agreement, was properly overruled by the referee (fol. 160, 161).

1. It was precisely the same question which was raised on the former trial between the same parties, and was very properly disposed of in the same way. See in record attached to printed case, fo. 277.

a. No evidence of express intention can be received to explain an ambiguity *patent* on the face of the agreement, if there be one.

Peake's Evidence, 116.
3 Cowen & Hill's Notes, 1374.
N. Y. Ins. Co. vs. Thomas, 3 John. Cases, 1.